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## ARTICLES

### THE 1994 I.L.C. DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT: A PRINCIPLED APPRAISAL OF JURISDICTIONAL STRUCTURE

*Bradley E. Berg\**

#### INTRODUCTION

FOR AT LEAST ONE HUNDRED YEARS, the international legal community has been contemplating the establishment of a permanent international criminal court. While *ad hoc* international criminal tribunals have been created on several occasions, including four times this century — Nuremberg, Tokyo, the former Yugoslavia, and Rwanda — the world has not yet seen a permanent international criminal court.<sup>1</sup> This may soon change. The most recent model put forth by the International Law Commission (I.L.C.) has attracted the greatest international support of any permanent court proposal made to date, and an assessment of the strengths and weaknesses of this model is critical if we are to ensure that the debate over the proposal is well-informed and proceeds on a principled basis.<sup>2</sup>

After providing a brief overview of the evolution and jurisdictional structure of the 1994 I.L.C. Draft Statute, this Article will propose that

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<sup>1</sup> Perhaps the most famous *ad hoc* tribunal was the 1810 Congress of Aix-la-Chapelle which tried and convicted Napoleon Bonaparte for waging unjust wars, sentencing him to exile on Elba. In 1895, in a proposal rejected by the Institute of International Law, the International Red Cross recommended the creation of a permanent international criminal court to deter continued violations of war. 1 BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 6 (1980). See also Michael D. Greenberg, *Creating an International Criminal Court*, 10 B.U. INT'L L.J. 119, 122-25 (1992).

<sup>2</sup> This recent proposal is the *Draft Statute for an International Criminal Court*, Int'l L. Comm'n, 46th Sess., U.N. Doc. A/CN.4/L.491/Rev.2 (1994) [hereinafter *Working Group Report*]. This Article will hereinafter refer to this proposal as "the I.L.C. Court."

this draft statute and other models be evaluated according to four principles and two objectives which underlie international criminal law. These principles are individual criminal responsibility, non-retroactivity, judicial independence, and the guarantee against double jeopardy; the objectives are deterrence and legitimacy. At various points, the 1994 I.L.C. Draft Statute will be contrasted to six previous proposals for the establishment of a permanent international criminal court: the Sottile Proposal (1951),<sup>3</sup> the United Nations Draft Statute (1953),<sup>4</sup> the International Law Association (I.L.A.) Proposal (1982),<sup>5</sup> the Bassiouni Proposal (1987),<sup>6</sup> the Siracusa Proposal (1990),<sup>7</sup> and the American Bar Association (A.B.A.) Proposal (1991).<sup>8</sup> Similarly, on certain questions, the 1994 I.L.C. Draft Statute will be compared with the jurisdictional structures of the four *ad hoc* tribunals convened in this century: the International Military Tribunal at Nuremberg,<sup>9</sup> the International Military Tribunal for the Far East,<sup>10</sup> the International Criminal Tribunal for the former Yugoslavia,<sup>11</sup> and the

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<sup>3</sup> See generally ANTOINE SOTTILE, *LE PROBLEME DE LA CREATION D'UNE COUR PENALE INTERNATIONALE PERMANENTE* (1951) [THE PROBLEM OF THE CREATION OF A PERMANENT INTERNATIONAL CRIMINAL COURT] (Kraus Reprint Ltd. trans., 1966).

<sup>4</sup> *Report of the 1953 Committee on International Criminal Jurisdiction*, U.N. GAOR, 9th Sess., Annex, Supp. No. 12, at 23, U.N. Doc. A/2645 (1954).

<sup>5</sup> See generally Int'l Crim. L. Comm., Int'l L. Ass'n, *Sixth Interim Report*, in REPORT OF THE 61ST CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION 252 (1985).

<sup>6</sup> See generally M. CHERIF BASSIOUNI, *A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 1987* [hereinafter BASSIOUNI, DRAFT CODE AND STATUTE].

<sup>7</sup> This proposal was developed by a group of experts under the auspices of the Istituto Superiore Internazionale di Scienze Criminali, and was based largely on an earlier draft statute for a criminal court to implement the Apartheid Convention. *Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of Apartheid*, U.N. Doc. E/CN.4/1426 (1981). See Jose A. Baez, *An International Crimes Court: Further Tales of the King of Corinth*, 23 GA. J. INT'L & COMP. L. 289, 300 (1993).

<sup>8</sup> *The American Bar Association Task Force on an International Criminal Court-Preliminary Report to the House of Delegates* (Jan. 1992). See also Baez, *supra* note 7, at 307-09.

<sup>9</sup> *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal*, Aug. 8, 1945, 59 Stat. 1544, 1555, 82 U.N.T.S. 251, 279 [hereinafter I.M.T. Charter].

<sup>10</sup> *International Military Tribunal for the Far East*, Jan. 19, 1946, T.I.A.S. 1589, 4 Bevans 20.

<sup>11</sup> *Secretary General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, U.N. SCOR,

International Criminal Tribunal for Rwanda.<sup>12</sup> The analysis that follows will reveal that, while generally sound and a marked improvement over previous models, the 1994 I.L.C. Draft Statute is deficient in four important respects, all of which can be cured by amendments to the statute.

## II. THE EVOLUTION OF THE 1994 I.L.C. STATUTE

From the day of its inception in 1946, the I.L.C. has been the principal player on the project of creating a permanent international criminal court. While the I.L.C.'s original mandate was to facilitate the development of international law through codification,<sup>13</sup> its first specific task was a request by the General Assembly in 1948 to study the possibility of establishing an organ of international criminal jurisdiction.<sup>14</sup> Ever since, except for a substantial hiatus from the mid-1950s to the early 1980s, the work of the I.L.C. in international criminal law has been split between the twin projects of developing an international criminal code and establishing an international criminal court.

For most of its life, the Commission's primary concern has been the development of the Draft Code of Offences against the Peace and Security of Mankind. A version of the Draft Code was presented to the General Assembly in 1954,<sup>15</sup> but was held in abeyance without endorsement

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48th Sess., at 36, U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159 (1993) [hereinafter Yugoslav Statute].

<sup>12</sup> *Security Council Resolution 955* (1994) *Establishing the International Tribunal for Rwanda*, U.N. SCOR, 49th Sess., 3453rd mtg. at 3, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter Rwandan Statute].

<sup>13</sup> *Establishment of an International Law Commission*, G.A. Res. 174(II), U.N. GAOR, 2nd Sess., 123rd mtg. at 1272-79, U.N. Doc. No. A/504 (1947). Resolution 174(II) expressly placed codification among the tasks of the new Commission. *Id.* When the I.L.C. was directed to consolidate the Judgment of the International Military Tribunal at Nuremberg, it was also charged with drafting a code of international crimes. *Id.* at 1280-82.

<sup>14</sup> Upon the conclusion of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, S. REP. NO. 2, 99th Cong., 1st Sess. (1985); 78 U.N.T.S. 1021 [hereinafter Genocide Convention], which contemplates the possibility of an international criminal court in Article VI, the General Assembly directed the I.L.C. to investigate the issue of establishing a criminal tribunal. *Prevention and Punishment of the Crime of Genocide: Study by the I.L.C. of the Question of an International Criminal Jurisdiction*, G.A. Res. 260B(III), U.N. GAOR, 179th mtg. (1948), *reprinted in* UNITED NATIONS, HISTORICAL SURVEY OF THE QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION at 5-6, U.N. Doc. No. A/CN.4/7/Rev.1, U.N. Sales No. 1949.V.8 (1949).

<sup>15</sup> *Draft Code of Offences Against the Peace and Security of Mankind*, U.N. GAOR, 9th Sess., Supp. No. 9, at 9, U.N. Doc. A/2693 (1954). A definition of aggression for

pending work that was proceeding simultaneously on the definition of aggression. It was not until 1981 that the General Assembly invited the I.L.C. to resume its work on the Draft Code, and in 1989 the I.L.C. was requested to consider the establishment of a court of general international criminal jurisdiction to facilitate the work proceeding on the Draft Code. By 1992, the court project had superseded the long-delayed Draft Code in terms of interest and priority within the I.L.C., and a special working group was convened to produce a Draft Statute for an international criminal court.<sup>16</sup> The two projects have proceeded more or less independently since 1992 following a shift in the philosophy of the I.L.C. away from a code-centric international criminal court.<sup>17</sup> In 1993, the special working group opened a Draft Statute for international consideration and comment.<sup>18</sup> One year later, the working group produced the 1994 Draft Statute for an International Criminal Court, which was adopted by the I.L.C. in Geneva at its forty-sixth session.<sup>19</sup> The draft is presently before the Sixth Committee and is expected to be considered by the General Assembly in the near future.<sup>20</sup>

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the purposes of state acts was adopted by the General Assembly in 1974. However, the definition of *aggression* for the purposes of individual criminal offenses continues to be one of the many barriers to progress on the Code. Michael P. Scharf, *The Jury is Still Out on the Need for an International Criminal Court*, 1 DUKE J. COMP. & INT'L L. 135, 157-58 (1991).

<sup>16</sup> See *Report of the International Law Commission on its Forty-Fifth Session*, U.N. GAOR, 48th Sess., Supp. No.10, at 21-25, U.N. Doc. A/48/10 (1993). See also James Crawford, *The I.L.C.'s Draft Statute for an International Criminal Tribunal*, 88 AM. J. INT'L L. 140 (1994) (discussing the 1993 draft) [hereinafter Crawford, *Draft Statute*]. For a discussion of the 1994 draft, see James Crawford, *The I.L.C. Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404 (1995) [hereinafter Crawford, *I.L.C. Statute*].

<sup>17</sup> Work on the Draft Code of Crimes continues. In 1991, a version of the Draft Code was provisionally adopted by the I.L.C., the text of which is attached to the I.L.C. report of that year. See *Report of the International Law Commission on the Work of its Forty-Third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 238, U.N. Doc. A/46/10 (1991).

<sup>18</sup> See *Report of the Working Group and the Draft Statute of the International Criminal Court*, 2 Y.B. Int'l L. Comm'n 100, U.N. Doc. A/CN.4/Ser.A/1993/Add.1 (Part 2), reprinted in 33 I.L.M. 253 (1994).

<sup>19</sup> *International Law Commission Concludes Forty-Sixth Session*, U.N. Doc. L/94/4 (1994). See generally *Working Group Report*, *supra* note 2.

<sup>20</sup> On November 23, 1994, the Sixth Committee considered the 1994 I.L.C. Draft Statute and passed a resolution to the following effect: an *ad hoc* committee was struck to review the statute and submit a report to the next General Assembly; additional comments from member states and organs of the U.N. were invited; the Secretary-General was asked to prepare financial estimates for the proposed court's establishment

## II. THE JURISDICTIONAL STRUCTURE OF THE 1994 I.L.C. DRAFT STATUTE

The 1994 I.L.C. Draft Statute proposes the creation of an international criminal court by multilateral treaty, thereby establishing state consent as a central theme of the Statute.<sup>21</sup> The I.L.C. Court would not be dependent on the Security Council for its existence, although unspecified future arrangements are intended to foster a close relationship to the United Nations.<sup>22</sup> While the Court would be permanent, it would be not be a standing or full-time institution.<sup>23</sup> This reflects a compromise between the virtues of permanency and the practical expectation that, at least initially, the Court would not be sufficiently busy to necessitate a full-time structure. If the Presidency of the Court desires a conversion to full-time status due to increases in workload, it could request the States that are party to the Statute to pass a resolution implementing such a change.<sup>24</sup>

Part 3 of the Statute contains the principal jurisdictional framework of the I.L.C. Court.<sup>25</sup> For the most part, like the International Court of Justice (I.C.J.), the I.L.C. Court would operate on the basis of "ceded

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and operation; and the Sixth Committee resolved to consider the *ad hoc* committee's report during the next General Assembly. *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, U.N. GAOR, 6th Comm., 49th Sess., at 17-18. U.N. Doc. A/49/738 (1994). The General Assembly subsequently adopted the resolution of the Sixth Committee without a vote. *Establishment of an International Criminal Court*, G.A. Res. 49/53, U.N. GAOR, 49th Sess., 84th mtg., Supp. No. 49, at 293, U.N. Doc. A/49/49 (1994).

<sup>21</sup> Unless otherwise specified, all subsequent references to articles refer to those of the 1994 Draft Statute.

<sup>22</sup> *Working Group Report*, *supra* note 2, 1994 Draft Statute, at art. 4. Depending on the Court's precise form, an amendment to the U.N. Charter may be necessary, *id.*, although this is unlikely.

<sup>23</sup> *Working Group Report*, *supra* note 3, 1994 Draft Statute, at art. 4.

<sup>24</sup> Such a resolution would require a two-thirds majority to be successful. *Id.* at art. 10, ¶4. This article also prohibits certain personal activities that may compromise the independence of a judge. Article 17 ensures secure remuneration for the judiciary. The provisions pertaining to the composition and administration of the Court, including the election of judges, are found at Articles 5-19. *See also* Crawford, *Draft Statute*, *supra* note 16, at 144.

<sup>25</sup> Article 20 lists the crimes that fall within the jurisdiction of the Court; Article 21 states the preconditions to jurisdiction; Article 22 provides for state acceptance of the Court's jurisdiction in a given case; and Article 23 pertains to the Court's jurisdiction in the face of Security Council action. Under Article 24, the Court has in each case a general duty to satisfy itself that it has jurisdiction before proceeding.

jurisdiction" — that is, it would acquire jurisdiction in a given case only through state consent.<sup>26</sup> Also like the I.C.J., the I.L.C. Court structure distinguishes between a state's general support for the Court and that state's acceptance of the Court's jurisdiction in a given case.<sup>27</sup> The former would occur through state accession to the treaty and Statute, while the latter would occur through a declaration lodged with the Court by the state. This declaration could be of general application or could be limited to type of conduct or conduct committed during a specified period of time.<sup>28</sup>

The jurisdiction of a court can be conceptualized as having three components: personal jurisdiction (*ratione personae*), subject matter jurisdiction (*ratione materiae*), and the "form" or "nature" of the jurisdiction itself.<sup>29</sup> Under the I.L.C. Court, the component of personal jurisdiction is uncomplicated: only natural persons would be subject to the new tribunal.<sup>30</sup> The second component, subject matter jurisdiction, is the body of law over which the I.L.C. Court would have jurisdiction. It is exhaustively stated in five heads under Article 20: genocide, aggression, serious violations of the laws and customs of armed conflict, crimes against humanity, and exceptionally serious instances of crimes established under treaties listed in the Annex to the Statute. The first four heads are collectively referred to as "crimes under general international law"; the final head is referred to as "treaty crimes." These five offense groupings are greatly clarified below.

The final component, the form or nature of jurisdiction, is a direct product of the voluntariness of the I.L.C.'s approach: the Court would

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<sup>26</sup> The two sole exceptions are cases of genocide.

<sup>27</sup> *Working Group Report*, *supra* note 2, 1994 Draft Statute, at art. 22. A declaration of general jurisdictional acceptance would be analogous to the so-called "optional clause" in Article 36, ¶2, of the I.C.J. Statute. U.N. CHARTER, I.C.J. STATUTE, art. 36, ¶2. "General support" is shown by becoming party to the court's constitutive statute. In the case of the I.C.J., membership in the U.N. automatically makes a state party to the Statute of the I.C.J. *Id.* at art. 93. The I.C.J. requires additional action, principally consensual submission, in order to acquire jurisdiction in a given case. *Id.* at art. 36.

<sup>28</sup> *Working Group Report*, *supra* note 2, 1994 Draft Statute, at art. 22.

<sup>29</sup> See *Report of the International Law Commission on the Work of its Forty-Second Session*, U.N. GAOR, 45th Sess., Supp. 10, at 46-48, U.N. Doc. A/45/10 (1990) (discussing the jurisdictional framework of an international criminal court); see also Baez, *supra* note 7, at 302-03.

<sup>30</sup> Previous proposals have suggested prosecuting corporations, other organizations or sovereign states. Restricting personal jurisdiction to natural persons is an assumption that runs throughout the Draft Statute and is confirmed by the commentary. Curiously, however, the Draft Statute does not expressly state this restriction.

have concurrent original jurisdiction. Barring Security Council action under Chapter VII, an alternative that already exists today, the Statute does not reserve a single instance of international crime for the exclusive domain of this new court. Domestic courts would continue to have judicial jurisdiction over every international crime, although cases falling under the Statute would now also be subject to the judicial jurisdiction of the I.L.C. Court. As we will see, Part 3 of the Statute contains a number of stringent requirements in order that a case become subject to the international court's jurisdiction. In comparison to both earlier court proposals and the range of cases that potentially could have been covered, the jurisdictional basket of the I.L.C. Court is relatively small.

The practical operation of the whole of Part 3 of the Statute is considerably more complicated than the three preceding components may suggest. It can be summarized in the following manner:

(I) FOR THE TWO HEADS OF SERIOUS VIOLATIONS OF THE LAWS AND CUSTOMS OF ARMED CONFLICT AND CRIMES AGAINST HUMANITY, the procedure is the most straightforward.<sup>31</sup> The Court would acquire jurisdiction in a case involving these offenses if suitable declarations have been or are then lodged pursuant to Article 22 by each of the following states: the state in custody of the accused; the state in whose territory the alleged offense was committed; and, if applicable, the state or states that have lawfully requested extradition of the accused for this offense, the request(s) not having been rejected by the custodial state.<sup>32</sup>

(II) FOR THE HEAD OF AGGRESSION, the procedure mirrors (I), but with one exception. No person could be charged with aggression under the Statute unless the Security Council had first determined that a State had committed the act of aggression which is the subject of the charge.<sup>33</sup>

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<sup>31</sup> The general provision for subject matter jurisdiction over armed conflict offenses and crimes against humanity is Article 20(c) and (d). Note that "serious violations of the laws and customs applicable in armed conflict" refers to serious offenses committed during wartime, but avoids the requirement of "war" due to the fact that modern armed conflicts generally occur in the absence of a formal declaration of war. This subject matter head is probably intended to encompass certain offenses under the war crimes provisions of the Hague Convention of 1907 Respecting the Laws and Customs of War On Land, Oct. 18, 1907, 36 Stat. 227, 1 Bevans 631. *See also Working Group Report, supra* note 2, Commentary, Addendum 1, at 23-25.

<sup>32</sup> *Working Group Report, supra* note 2, 1994 Draft Statute, at art. 21. The incorporation of the existing extradition system is a necessary corollary to the concurrent jurisdiction approach. The I.L.C. Court is intended to complement the existing international criminal justice system, including extradition procedures. *See id.* at pt. 7 (arts. 51-57, which are provisions for international cooperation and judicial assistance).

<sup>33</sup> *Id.* at art. 23, ¶2. The general provision for subject matter jurisdiction over



This provision reflects a compromise between the desirability of individual criminal responsibility for aggression and the practical fact that aggression (or "crime against peace") is bound to state action.<sup>34</sup>

(III) UNDER THE HEAD OF GENOCIDE, the Statute combines with the Genocide Convention<sup>35</sup> to produce the I.L.C. Court's only opportunity for inherent jurisdiction. If the Court received a complaint of genocide from a state that is party to both this Statute and the Genocide Convention, the Court would automatically acquire jurisdiction over that case regardless of the location of the alleged offense, the consent of the states involved, or any other factor.<sup>36</sup> The granting of inherent jurisdiction under this head is a reflection of the universal acknowledgement of genocide as a part of *jus cogens*, the widely ratified status of the Genocide Convention, and particularly, the Convention's express contemplation of an international criminal court for this offense.<sup>37</sup>

(IV) THE HEAD OF TREATY CRIMES is exhaustively defined in scope by the list of thirteen treaties in the Annex to the Statute.<sup>38</sup> In contrast to the offenses discussed above, these crimes are not part of general international law, but are applicable through accession to their respective conventions.<sup>39</sup> The treaty list includes, among others, the Apartheid

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aggression is Article 20(b).

<sup>34</sup> See *Working Group Report*, *supra* note 2, Commentary, Addendum 1, at 22.

<sup>35</sup> Genocide Convention, *supra* note 14.

<sup>36</sup> This is the combined effect of Articles 21, ¶1(a) and 25, ¶1, *Working Group Report*, *supra* note 2, 1994 Draft Statute. The general provision for subject-matter jurisdiction over genocide is Article 20(a). *Id.*

<sup>37</sup> See *Working Group Report*, *supra* note 2, Commentary, Addendum 1, at 21-22. Article VI of the Genocide Convention provides that individuals charged with genocide may be tried by a competent state tribunal or "such international penal tribunal as may have jurisdiction . . ." Genocide Convention, *supra* note 14, at art. VI, S. REP. NO. 2, at 9; 78 U.N.T.S. at 281-82. For an excellent overview of the development of the Convention and its terms, see Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 1 TEMPLE INT'L & COMP. L. J. 1 (1994).

<sup>38</sup> The general provision for subject matter jurisdiction over treaty crimes is Article 20(e).

<sup>39</sup> This distinction may not be entirely accurate. This author would argue that the international offense of apartheid, which is listed as a treaty crime in the Statute, is also an offense under general international law. Like genocide, the presence of a comprehensive convention pertaining to apartheid should not obscure the fact that the offense exists generally, regardless of a given state's accession to the convention. This was also the view of a minority of members of the I.L.C. Working Group. See *Working Group Report*, *supra* note 2, Commentary, Addendum 1, at 27. This categorization distinction is critically important for the purposes of the principle of non-retroac-

Convention,<sup>40</sup> the Montreal Convention on Aircraft Hijacking,<sup>41</sup> and the "grave breaches" sections of the 1949 Geneva Conventions.<sup>42</sup> While the unfinished Draft Code of Crimes is naturally not included, it is expected to be added to the list if and when it is completed.<sup>43</sup> The I.L.C. Court would acquire jurisdiction in a case under this head according to the same state consent procedure that is set out in (I), above.

(V) IN THE EVENT OF SECURITY COUNCIL ACTION UNDER CHAPTER VII, the requirements of state consent and state complaint set out above would not apply.<sup>44</sup> Acquisition of jurisdiction by this avenue would place the I.L.C. Court in essentially the same position as the *ad hoc* tribunals convened by the Security Council for the former Yugoslavia and Rwanda. The operative provision is Chapter VII, which requires the compliance of all state parties to the U.N. Charter, and accordingly, their compliance with all operations and orders of the I.L.C. Court when acting under Chapter VII authority.<sup>45</sup> The sole restriction imposed by the proposed Statute is that the I.L.C. Court would continue to be restricted to hearing cases within the subject-matter scope set out in Article 20. In other words, if the Security Council desired the adjudication of international crimes outside the five offense groupings described above, other fora

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tivity, which is stated in Article 39. See discussion *infra* part C.2.

<sup>40</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.

<sup>41</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 Sept. 1971, 24 U.S.T. 564, 974 U.N.T.S. 177.

<sup>42</sup> Collectively, the Geneva Conventions define *grave breaches* as willful killing, torture, or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or civilian to serve in the forces of a hostile Power; willfully depriving a prisoner of war or civilian of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; and the taking of hostages. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August, 1949, art. 50, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62; Geneva Convention for the Amelioration of the Condition of Wounded, Sick & Shipwrecked Members of Armed Forces at Sea of 12 August, 1949, art. 51, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85, 116; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August, 1949, art. 130, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 135, 238; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August, 1949, art. 147, 6 U.S.T. 3516, 3618, 75 U.N.T.S. 287, 388. See also 1977 Protocol Additional to the Geneva Conventions of 12 August, 1949 (Protocol I), June 8, 1977, art. 85, 1125 U.N.T.S. 3, 42.

<sup>43</sup> See *Working Group Report*, *supra* note 2, Commentary, Addendum 1, at 28-29.

<sup>44</sup> See *Working Group Report*, *supra* note 2, 1994 Draft Statute, at art. 23.

<sup>45</sup> U.N. CHARTER, arts. 25, 48, 49.

would have to be considered — perhaps even the establishment of another international tribunal on an *ad hoc* basis.

### III. APPLYING THE PRINCIPLES AND OBJECTIVES OF INTERNATIONAL CRIMINAL LAW

With all the convulsions in global society, only one power is left that can impose order on incipient chaos. It is the power of principles transcending changing perceptions of expediency.<sup>46</sup>

While “incipient chaos” would be an unfairly damning description of the evolution of international criminal law, there could scarcely be a more appropriate label for its institutional management than “changing perceptions of expediency.” Since the end of the Second World War, the international legal community has lurched from crisis to crisis in sporadic attempts to develop and adjudicate international criminal law. This lack of direction or coherent strategy is at least partly attributable to a general failure to identify and abide by fundamental principles and objectives in international criminal law. In particular, the four *ad hoc* criminal tribunals have been the very embodiments of expediency, motivated much more by what was politically possible than by any sense of legal principle. In an attempt to attach anchors to a project that has spent the last fifty years in haphazard drift, this Article argues that international criminal law tribunals, including the I.L.C. Court, must be measured against the following four principles and two objectives of international criminal law.

These six criteria have been selected on the basis of their relationship to the jurisdictional structure of an international criminal tribunal, as well as their normative force within international criminal law. Obviously, there are other principles that play important roles in international criminal prosecutions — the presumption of innocence and the right to counsel, to name two — but it is the following six principles and objectives that bear directly on the form the jurisdictional structure of an international criminal tribunal should take.

#### A. *Individual Criminal Responsibility*

There is no question that individual criminal responsibility is the pre-eminent principle of international criminal law. Although it was already part of international law by the end of the Second World War, it was

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<sup>46</sup> Secretary-General Boutros Boutros-Ghali, Statement at the Security Council Summit Meeting (Jan. 31, 1992), in 3 THOMAS FRANCK, FAIRNESS IN THE INTERNATIONAL LEGAL AND INSTITUTIONAL SYSTEM: GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 189 (Hague Acad. of Int'l L. No. 240, 1993).

greatly clarified and strengthened as a legal principle in the Charter and Judgment of the International Military Tribunal at Nuremberg.<sup>47</sup> Individual criminal responsibility has been applied as a principle of international law on numerous occasions in both domestic and international criminal prosecutions in the half-century since Nuremberg.<sup>48</sup> It is also reflected in several conventions pertaining to discrete offenses under international law.<sup>49</sup> The connection between individual criminal responsibility as a principle of law and the jurisdictional structure of an international criminal tribunal is obvious. The personal jurisdiction (*ratione personae*) of the tribunal must include natural persons. Perhaps not surprisingly, the 1994 I.L.C. Draft Statute, as well as all previous court proposals considered in this Article, satisfies this requirement. The more interesting observation is that the I.L.C. Draft Statute joins the U.N. Draft Statute (1953), I.L.A. Proposal (1982), Siracusa Proposal (1990), A.B.A. Proposal (1991) in *limiting* the personal jurisdiction of the court to natural persons. In contrast, Sottile (1951) and Bassiouni (1987) proposed extending international criminal liability to corporations, organizations, and states. Conceptually, the I.L.C. approach is the correct one. Attaching criminal responsibility to non-individual actors would raise numerous practical problems, particularly with respect to the likelihood of voluntary state accession and eventual enforcement. More importantly, the principles and objectives that underpin international criminal law flow directly from legal rights held by individuals, not states or organizations. As Bassiouni himself concedes, the precedents and conventions that comprise international criminal law clearly indicate that international criminal responsibili-

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<sup>47</sup> See I.M.T. Charter, *supra* note 9, art. 6, and INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG) JUDGMENT, TRIAL OF THE MAJOR WAR CRIMINALS: PROCEEDINGS 27 AUG.-1 OCT. 1946, at 411, 466-67 (1971) [hereinafter I.M.T. JUDGMENT]. Individual criminal responsibility was the first principle identified by the I.L.C. in its Formulation of the Nuremberg Principles. *Report of the International Law Commission on its Second Session, 5 June to 29 July, 1950, reprinted in* 44 AM. J. INT'L L. 105, 126-34 (Supp. 1950). For a pre-Nuremberg view of individual criminal responsibility, see Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 534-36 (1942-43).

<sup>48</sup> For a domestic case, see Attorney General of Israel v. Eichmann, 36 I.L.R. 18 (Isr. Dist. Ct. 1961), *aff'd*, 36 I.L.R. 277 (Isr. S. Ct.). Internationally, the tribunals presently operating in the former Yugoslavia and Rwanda are excellent examples of the principle at work. See Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 79 (1994).

<sup>49</sup> See, e.g., Genocide Convention, *supra* note 14, at art. VI, S. REP. NO. 2, at 9; 78 U.N.T.S. at 281-82 (providing that persons charged with genocide may be tried by an international penal tribunal).

ty is fundamentally individual.<sup>50</sup> Even where offenses are committed at the behest of organizations or under the guise of state policy, they are committed by individuals, and it is individuals to whom criminal law is addressed. The ruling of the I.M.T. at Nuremberg on this point is especially germane:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.<sup>51</sup>

Similarly, Franck warns against losing the focus on the individual in the development of international criminal law:

This new emphasis on international law's capacity to assign responsibility to individuals must be understood as paralleling the growth of international legal rights of individuals. The growth of human rights of persons inevitably goes along with the growth of persons' responsibility for human wrongs, even when committed under the colour of State authority.<sup>52</sup>

This is not to say that states do not play a large role in the commission of certain offenses or that the role played is excusable. Rather, international criminal law is not the appropriate legal vehicle to address state action that facilitates or induces the criminal acts of individuals. Brownlie states that it is not illogical to prosecute an individual, but not the participant state, for an "act of state" that constitutes a criminal offense: criminal law is concerned with the physical act and state of mind of the individual, not the legal character of the state's action, which is wholly different.<sup>53</sup> International fora other than an international criminal court, notably the Security Council or International Court of Justice, are more suited to addressing the wrongful acts of states.

In recognizing the role uniquely played by states in one specific offense, aggression, the 1994 I.L.C. Draft Statute represents a marked improvement over past proposals.<sup>54</sup> Analogous to the offense known at Nuremberg and Tokyo as "crimes against peace," the crime of aggression

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<sup>50</sup> BASSIÖUNI, DRAFT CODE AND STATUTE, *supra* note 6, at 51-52.

<sup>51</sup> I.M.T. JUDGMENT, *supra* note 47, at 466-67.

<sup>52</sup> 3 THOMAS M. FRANCK, FAIRNESS IN THE INTERNATIONAL LEGAL AND INSTITUTIONAL SYSTEM: GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 246 (Hague Acad. of Int'l L. No. 240, 1993) [hereinafter FRANCK, FAIRNESS IN THE INTERNATIONAL LEGAL AND INSTITUTIONAL SYSTEM].

<sup>53</sup> IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 166 (1963).

<sup>54</sup> See *Working Group Report*, *supra* note 4, Commentary, Addendum 1, at 22-23.

is entirely a servant of state action: briefly stated, it is the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state.<sup>55</sup> The necessity for state involvement is obvious. Nevertheless, the I.L.C. remained true to the principle of individual criminal responsibility by including the offense of aggression in the subject matter of the Statute. The fact that a Security Council determination would be required in order to prosecute under this head is not incompatible with the general principle, but merely reflects the nature of the offense itself. The balance struck by the I.L.C. on this point is commendable.

### B. Non-retroactivity

The principle of non-retroactivity is more precisely a composite of several separate principles of criminal law, although their exact distinctions will not play large roles in this analysis. The primary principle is known by the maxim *nullum crimen sine lege*, or no crime without a law; that is, a person can not be charged with an offense unless that offense existed in law at the time of the act. This encompasses the close corollary principle of the prohibition against the retroactive (*ex post facto*) application of criminal sanction; that is, laws can not be created after an act to make it criminal.<sup>56</sup> As evidenced by over a century of conventional law and customary state practice, *nullum crimen* is the core principle of substantive international criminal law.<sup>57</sup> Judicially, it was acknowledged by the Nuremberg and Tokyo tribunals, although distinguished from the facts in those cases,<sup>58</sup> and it was recognized by the Permanent

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<sup>55</sup> Designed as a guide for Security Council use, the complete definition is stated in *Definition of Aggression*, G.A. Res. 3314(XXIX), U.N. GAOR, 29th Sess., 2319th mtg., Annex, Agenda Item 86, Supp. No. 31, at 143, U.N. Doc. No. A/9631 (1974). Note that this definition concerns aggression by states only, and was not intended to define the offense as it may apply to individuals. It is used here only to provide a general picture of the nature of the offense. *Id.*

<sup>56</sup> M. CHERIF BASSIÖUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 113-14 (1992) [hereinafter BASSIÖUNI, *CRIMES AGAINST HUMANITY*]. See also Hernan S. Burgos, *The Application of International Humanitarian Law as Compared to Human Rights Law in Situations of Internal Armed Conflict, Internal Disturbances and Tensions, or Public Emergency, with Special Reference to War Crimes and Political Crimes*, in *IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW* 1, 11 (Frits Kalshoven et al. eds., 1989).

<sup>57</sup> BASSIÖUNI, *CRIMES AGAINST HUMANITY*, *supra* note 56, at 110-12. Please note, however, that Bassiöuni prefers to frame the principle as *nullum crimen sine iure*, or *no crime without good reason*, a departure this author cannot endorse and, in any event, a distinction which is irrelevant for the purposes of this discussion.

<sup>58</sup> I.M.T. Judgment, *supra* note 47, at 461-62; SOLIS HORWITZ, *THE TOKYO TRIAL*

Court of International Justice in *Danzig Legislative Decrees*.<sup>59</sup> Domestically, it has been recognized as a principle of justice on numerous occasions in various states.<sup>60</sup> No criminal law principle has been incorporated into more international resolutions and instruments than *nullum crimen sine lege*; Article 15 of the Civil and Political Rights Covenant is representative of the codified principle:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed . . . .
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.<sup>61</sup>

Part 5 of the 1994 I.L.C. Draft Statute provides for the operation of the trial and the rights of the accused. Article 39 incorporates the principle of *nullum crimen sine lege* in a manner that differentiates between "crimes under general international law" (the first four offense groupings) and "treaty crimes" (the fifth offense grouping). Here the effect of the

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475, 548 (Int'l Conciliation, Vol. No. 465, 1950). While recognizing *nullum crimen* as a principle of law, both tribunals rejected defense submissions that laws were being applied retroactively in these cases. However, one dissent was filed on this point in the Tokyo Judgment. *Id.*

<sup>59</sup> Note that this advisory opinion was confined to domestic constitutional interpretation, not public international law *per se*. Nevertheless, the Court stated that "it must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment." Advisory Opinion No. 65, Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, 1935 P.C.I.J. (Ser. A/B), No. 65, at 57.

<sup>60</sup> See, e.g., *R. v. Finta*, [1994] 1 S.C.R. 701, 709 (Can.) (separate opinion of Cory, J.) ("The rule against retroactive legislation is a principle of justice"). For the Canadian constitutional guarantee of non-retroactive criminal sanction, see CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(g) [hereinafter Canadian Charter].

<sup>61</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter I.C.C.P.R.]. See also *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, at art. 11, ¶ 2, U.N. Doc. No. A/811 (1948), reprinted in INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS 1948-1982, at 6 (UNIFO ed., 1983); Geneva Convention Relative to the Treatment of Prisoners of War of 12 August, 1949, art. 99, 6 U.S.T. 3316, 3392, 75 U.N.T.S. 135, 210; 1977 Protocol Additional to the Geneva Conventions of 12 August, 1949 (Protocol II), June 8, 1977, art. 6, ¶ 2(c), 1125 U.N.T.S. 609, 614; and European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 7, 213 U.N.T.S. 222, 228 [hereinafter European Human Rights Convention].

classification of offenses such as genocide and apartheid becomes especially clear: as we shall see, in comparison to crimes under general international law, treaty crimes would face much higher hurdles for applicability under Article 39 before they would fall within the jurisdiction of the I.L.C. Court.

Article 39 states that a person could not be found guilty of a crime under general international law unless the act or omission charged constituted a crime at the time it occurred. This provision reflects the fact that the first four offense groupings are generally applicable in substance to all states, with the only applicability concern being the relationship in time between the birth of the legal proscription and the act or omission in question. In respect of crimes under general international law, Article 39 completely satisfies the demands of *nullum crimen sine lege*. At the same time, it is broad enough to permit the prosecution of offenses under the general principles of law as recognized by the community of nations, prosecutorial flexibility which is expressly allowed under Article 15(2) of the Civil and Political Rights Covenant.

In respect of treaty crimes, the danger of retroactive application is considerably greater. These offenses are not generally applicable, but instead depend upon the consensual accession of states for their substantive application. The proscriptions contained in a certain treaty apply only in those states that are party to that treaty and have subsequently incorporated it into their domestic law. Therefore, unless the act or omission charged occurred in one of these treaty states, laying the charge would amount to creating a criminal offense without law — precisely the evil fought by *nullum crimen sine lege*. Article 39 provides protection by stating that no person could be found guilty of a treaty crime unless the treaty in question was applicable to the conduct of the accused at the time the act or omission charged occurred. The practical result is that there are two conditions imposed on treaty crimes, time and territorial applicability: that is, at the time of the offense, the state in which the alleged offense occurred would have to have been party to the relevant treaty and the offense charged would have to have been incorporated into that state's domestic law.<sup>62</sup> The legal result is that the principle of *nullum crimen sine lege* is wholly fulfilled by Article 39.

On this footing, the 1994 I.L.C. Draft Statute compares favorably with past proposals, all of which made careful attempts to avoid the retroactivity concerns of Nuremberg and Tokyo. Like the I.L.A. (1982) and A.B.A. (1991) proposals, the Statute provides for subject matter

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<sup>62</sup> Interestingly, the position of the accused's country of nationality under the treaty is irrelevant. *Working Group Report*, *supra* note 2, Commentary, Addendum 2, at 18.



jurisdiction — at least in part — through a list of named treaties. As a natural consequence of the separation of international criminal code and international criminal court projects within the I.L.C., the Statute has emerged as a flat rejection of the code-based approaches of Sottile (1951) and Bassiōuni (1987). For a variety of reasons, the I.L.C.'s decision to proceed with a court proposal prior to the completion of the long-delayed Draft Code of Crimes was wisely made. The arguments advanced by Bassiōuni and Sottile in favor of a code-based international criminal court pertain almost exclusively to the need to fulfil the principle of *nullum crimen sine lege*: absent an international code of crimes, there would be no systematic way of avoiding the retroactive application of offenses; moreover, substantive criminal law would be characterized by uncertainty and vagueness such that *nullum crimen* would be undermined.<sup>63</sup> These arguments are invalid and potentially counter-productive to the respective success of both code and court.

The question of the necessity of an international criminal code must be approached with a realistic appreciation of the role of criminal codes in domestic affairs, for it is often a domestic lawyer's yearning for textual certainty that gives an international code its appeal. Even in states that rely heavily upon domestic criminal codes, the substantive criminal law reaches far beyond the boundaries of the code. Illustrative of this is Canada, where the principal source of criminal law is the Criminal Code.<sup>64</sup> In reality, this is only the principal *statutory* source, and even among statutes, it is only one of many. The Narcotic Control Act,<sup>65</sup> the Young Offenders Act,<sup>66</sup> and a host of regulatory statutes are several examples of the myriad legislative sources of criminal offenses in Canada. Moreover, even the simplest case of a prosecution under the Criminal Code invokes other sources of law. Despite the abolition of common law offenses by section 9(a) of the Code, Canadian criminal law is still heavily dependent on the common law for statutory interpretation that, in some cases, is far more significant than the bare codified text. As Colvin advises, "[i]n this sense, the Canadian code is only a *partial* codification."<sup>67</sup>

Recall that it is certainty in the creation and application of offenses, and the corollary guarantee of non-retroactivity, that the international code proponents seek. If codification in the domestic arena, with its greater degree of institutional and substantive legal homogeneity, is incapable of

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<sup>63</sup> See BASSIÖUNI, DRAFT CODE AND STATUTE, *supra* note 6, at 9.

<sup>64</sup> Criminal Code of Canada, R.S.C. ch. C-46 (1993) (Can.).

<sup>65</sup> Narcotic Control Act, R.S.C., ch. N-1 (1993) (Can.).

<sup>66</sup> Young Offenders Act, R.S.C., ch. Y-1 (1993) (Can.).

<sup>67</sup> ERIC COLVIN, PRINCIPLES OF CRIMINAL LAW, 19-24 (2d ed. 1991).

providing this certainty, it is a safe assumption that international criminal codification will fail on this ground as well.<sup>68</sup> While codification may have the potential to contribute to legal certainty, any claim of inherent or complete certainty must be rejected. This argument should not be taken to mean, however, that the international system can be closely analogized to the domestic. There are many obvious differences between the two systems which, if anything, speak against the need for an international code. Justice La Forest of the Supreme Court of Canada persuasively states the lessons of the domestic/international comparison on this point:

The nature of a decentralized international system is such that international law cannot be conveniently codified in some sort of transnational code. Its differing sources may alarm some strict legal positivists, but almost all international lawyers now recognize that such a crude analogy to the requirements of a domestic law system is simplistic . . . .

. . .

[E]ven though there is no codification, international law can nevertheless be determined. Given our common law tradition, we should be used to finding the law in a number of disparate sources.<sup>69</sup>

Contrary to the claims of Bassiōuni and others, the principle of *nullum crimen sine lege* is not contingent on codification. International criminal law is already sufficiently certain to satisfy this principle. Avoiding the retroactive application of criminal law would be better served by creating a permanent judicial institution to guide the development of the law than by a continued preoccupation with its codification.<sup>70</sup> Instead, proponents of an international criminal code should wel-

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<sup>68</sup> Some scholars warn that the international codification project endangers the integrity of the entire system. If ready agreement on all issues in the code is not reached, the continued validity of those rules in customary international law may be cast in doubt. For an excellent discussion of this fear and the so-called "Martens Clause" as an attempted solution, see Georges Abi-Saab, *The Specificities of Humanitarian Law*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET* 265, 274 (Christophe Swinarski ed., 1984).

<sup>69</sup> *R. v. Finta*, [1994] 1 S.C.R. at 782, 785. Also in this case, Justice Cory expressly rejected the argument that the absence of codification renders international criminal law uncertain. "In my view, the fact that the entire body of international law is not codified and that reference must be made to opinions of experts and legal writing in interpreting it does not in itself make the legislation vague or uncertain." *R. v. Finta*, [1994] 1 S.C.R. at 867-68 (Justice Cory referring to the Canadian Criminal Code, R.S.C. ch. 46, § 7(3.71) (1993), which incorporates the international offenses of war crimes and crimes against humanity into Canadian law).

<sup>70</sup> Brownlie notes that, in the absence of a single international criminal court,

come the creation of an international court, for it would contribute to the eventual success of the code project. The establishment of an international court would facilitate the uniform and consistent development of international criminal law, which would correspondingly enhance the possibility of securing agreement on the provisions of the Draft Code.<sup>71</sup> The views of a former president of the International Association of Penal Law go significantly beyond mere facilitation or enhancement; Graven asserts that an international criminal court is a *necessary precondition* to an international criminal code:

As long as there is no judicial organ for the trial of international crimes, there will be neither a serious codification of international criminal law nor any serious application of an international sanction. The world will go on living in a judicial anarchy under violence and injustice with the risk of running into destruction.<sup>72</sup>

In light of the false promise of certainty offered by codification, and the ability of uncoded international law to satisfy the principle of *nullum crimen sine lege*, the court project must not be forced to queue behind the long-delayed draft code. As the I.L.C. has wisely decided, the merits of an international court stand on their own terms, independent of a code and perhaps even capable of contributing to its eventual success.

### C. Judicial Independence

In any legal system, domestic or international, judicial independence is the principal guarantee of the rule of law.<sup>73</sup> It is the touchstone of freedom under the law and a critical bulwark against political interference in the judicial process.<sup>74</sup> As a safeguard for judicial impartiality, judicial

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international crimes must be defined meticulously in order to prevent charges of retroactivity and to avoid discrepancies between ad hoc tribunals, thus suggesting that a permanent international court would contribute to the precision and clarity of substantive law. BROWNIE, *supra* note 53, at 207.

<sup>71</sup> Scharf, *supra* note 15, at 157.

<sup>72</sup> This statement was made in response to a questionnaire sent to eminent jurists in 1948 by the International Association of Penal Law and the International Bar Association. See SOTTILE, *supra* note 3, at 55.

<sup>73</sup> See Jules Deschenes, *Toward an Independent Judiciary: Canadian and International Perspectives*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 514, 514 (Shimon Shetreet & Jules Deschenes eds., 1985).

<sup>74</sup> See Ninian M. Stephen, in *Judicial Independence-A Fragile Bastion*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 529, 530 (Shimon Shetreet & Jules Deschenes eds., 1985) For excellent discussions of judicial independence in two domestic constitutional contexts, American and Canadian respectively, see Irving R.

independence helps to ensure the fair adjudication of the rights and claims at stake in any given case, that is, the right to a fair trial.<sup>75</sup> Therefore, in a sense, without giving effect to the principle of judicial independence, our recognition of other principles and objectives in international criminal law may come to naught. Judicial independence has been incorporated into numerous international and domestic conventions and resolutions. Often, as typified by Article 14, para. 1 of the Civil and Political Rights Covenant, the principle of judicial independence is combined with the right to a fair trial in a single codified guarantee:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law . . . .<sup>76</sup>

Institutional independence, which includes not only financial independence but also a court's general administrative independence from the political function of government, is a large component of overall judicial independence.<sup>77</sup> The degree of institutional independence enjoyed by an international criminal court will be largely determined by jurisdictional factors. For example, a court that is too closely obligated to political

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Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980); and MARTIN L. FRIEDLAND, *A PLACE APART: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN CANADA* (1995).

<sup>75</sup> The Supreme Court of Canada recently made explicit the correlation between judicial independence and impartial adjudication in *R. v. Lippe*, [1991] 2 S.C.R. 114, 116-17 (Can.).

<sup>76</sup> I.C.C.P.R., *supra* note 61, at art. 14, ¶1, 999 U.N.T.S. at 176. See also *Universal Declaration on Human Rights*, *supra* note 61, at art. 10; European Human Rights Convention, *supra* note 61, at art. 6, 213 U.N.T.S. at 228; U.N. DEP'T OF INT'L ECONOMIC & SOCIAL AFFAIRS, SEVENTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, U.N. Doc. No. A/CONF.121/22/Rev.1, at 58-62, U.N. Sales No. E.86.IV.1 (1986) (setting forth basic principles on the independence of the judiciary). For a domestic view, see Canadian Charter, *supra* note 60, § 11(d).

<sup>77</sup> See Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 590, 598 (Shimon Shetreet & Jules Deschenes eds., 1985); Jonathan T. Fried, *Improving of [sic] the Administration of Justice in the Americas: Report on Protection and Guarantees for Judges and Lawyers in the Exercise of Their Functions*, in REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON "IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE IN THE AMERICAS: PROTECTION AND GUARANTEES FOR JUDGES AND LAWYERS IN THE EXERCISE OF THEIR FUNCTIONS" 3, 20-25, CJI/SO/II/doc.42/94 rev.2 (1994).

actors, whether those are the Security Council, the General Assembly, or individual states, would find its institutional independence compromised. Canadian courts have held that it is unacceptable for an external force to be in a position to interfere in matters which are directly and immediately relevant to the adjudicative function. Furthermore, they have held the test of judicial independence to be whether an informed and reasonable person would perceive the tribunal as being independent, not whether that person can prove actual interference.<sup>78</sup> Because a similar test in international law has not yet emerged, the Canadian test will be employed as a rough aspirational standard for the present project.

In its approach to the 1994 Draft Statute, the I.L.C. has taken two critical steps toward ensuring judicial independence. First, it has rejected the *ad hoc* approach to establishing international tribunals in favor of creating a permanent international criminal court. The incompatibility between temporarily constituted judicial bodies and judicial independence is widely acknowledged: simply put, courts that are not permanent are too vulnerable to political manipulation, including outright termination, to be truly independent. Domestically, the rule against *ad hoc* tribunals is a fundamental principle of law in over twenty countries; Shetreet goes so far as to call this rule "an imperative prerequisite of an independent judicial system."<sup>79</sup> Internationally, concerns about judicial independence and impartiality have led to the dissolution of an important *ad hoc* tribunal in the past. This was the primary reason for the abandonment of the "permanent" Court of Arbitration in favor of the (truly) Permanent Court of International Justice, now the International Court of Justice.<sup>80</sup> Yet, as uncontentious as the rule against *ad hoc* tribunals may seem, it has been violated on four celebrated occasions this century. The I.L.C. promises not to repeat this error in principle.

The I.L.C.'s second step toward ensuring judicial independence was its choice of multilateral treaty as the means by which the Court would be implemented. Regardless of the improvements over Nuremberg and Tokyo that were made in the construction of the tribunals in the former Yugoslavia and Rwanda, these latter courts are no less creatures of political expediency than their post-war predecessors. The reasons are legion why the trials held at Nuremberg and Tokyo are stained by the label "victors' justice," all of which combine to present a stinging indictment of the independence of that judicial process.<sup>81</sup> In spite of precau-

<sup>78</sup> R. v. Genereux, [1992] 1 S.C.R. 259, 261-63 (Can.).

<sup>79</sup> Shetreet, *supra* note 77, at 615-16.

<sup>80</sup> See D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 255-73 (4th ed. 1982). Contrary to its name, of course, the Permanent Court of Arbitration was an *ad hoc* body. *Id.*

<sup>81</sup> The constitutive documents for the two post-war tribunals were unilaterally

tions that have been taken to better ensure the rights of the accused in the Yugoslav and Rwandan prosecutions, these present-day tribunals find their institutional independence compromised, primarily due to their relationship with the Security Council. Like Nuremberg and Tokyo, this is a case of great powers deciding when and how to conduct international criminal prosecutions, and then creating judicial bodies that are obligated to them. At any time, the Security Council can unilaterally revise or terminate the judicial processes underway in the former Yugoslavia and Rwanda; in other words, the Council is in a position to interfere in matters directly and immediately relevant to the adjudicative function, a situation that is unacceptable in domestic Canadian law.<sup>82</sup>

This sorry state would have been replicated under a permanent international criminal court if the I.L.C. had chosen the Security Council method of implementation. In contrast, establishment by multilateral treaty is much more conducive to judicial independence. The influence of individual states to interfere in the judicial process would be dispersed across the collection of states parties. The Security Council would retain a peripheral influence through the coordination of Chapter VII of the Charter and Article 23 of the Draft Statute, but this is no more power than the Council currently holds through Chapter VII itself. In any event, it is expected that the bulk of the I.L.C. Court's work would be consensual submission cases, not Security Council referrals, and making the Court available to the Council was understandably seen by the I.L.C. as preferable to the continued creation of separate *ad hoc* tribunals by the Council.<sup>83</sup>

A final appraisal of the degree of judicial independence to be enjoyed by the I.L.C. Court must await future agreement on the Court's relationship to the United Nations. Beyond its origin in a multilateral treaty, the Court could be specifically constituted in a number of different ways: as a principal organ of the United Nations, which would require an amendment to the Charter; as a secondary organ of the United Nations, which would not require an amendment; as an organ outside the United Nations but related by agreement; or as an organ outside the United

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drafted by Allied forces, the judges and prosecutors were drawn exclusively from Allied states, and, criminal proceedings were conducted only against German and Japanese officials. The two courts have suffered widespread criticism because of bias, pre-judgment of guilt, unclean hands, and interference with the prosecution. See BASSIÖUNI, *CRIMES AGAINST HUMANITY* *supra* note 56, at 115-17; Scharf, *supra* note 15, at 138; Onuma Yasuaki, *The Tokyo Trial: Between Law and Politics*, in *THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM* 45 (C. Hosoya et al., eds., 1986).

<sup>82</sup> *Genereux*, [1992] 1 S.C.R. at 263-64.

<sup>83</sup> *Working Group Report*, *supra* note 2, Commentary, Addendum 1, at 33.

Nations but related by a resolution of a U.N. organ.<sup>84</sup> Each alternative presents different implications for judicial independence. For example, the closer the relationship between the Court and the United Nations, the greater its potential financial security because the tribunal would not be required to solicit funds from states parties directly; however, as the ongoing funding crises of the Yugoslav tribunal indicates, even a close relationship is no guarantee of stable financial support.<sup>85</sup> As usual, the devil is in the details. Nevertheless, with its multilateral treaty approach, the I.L.C. Draft Statute has begun on solid ground in respect of judicial independence.

#### D. Double Jeopardy

This general principle has several different names. American lawyers call it double jeopardy protection. English lawyers refer to the special pleas of *autrefois acquit* and *autrefois convict*. Canadian law characterizes it as the rule against multiple convictions (the so-called *Kienapple* rule). Continental and international lawyers employ the phrase *non bis in idem*.<sup>86</sup> This Article will follow the international law tradition of *non bis in idem*, and it will stand in the shoes of all conceptualizations of the broader principle: *nemo debet bis vexari pro una et eadem causa*, or no one should be twice harassed for one and the same cause. In simplest terms, the principle of *non bis in idem* ensures that there is finality to judicial proceedings once all avenues of appeal have been exhausted. Without it, an accused person could be subjected to the fundamental unfairness of repeated prosecutions for the same act, theoretically continuing indefinitely until a conviction is secured.<sup>87</sup>

There is no question that *non bis in idem* is a fundamental principle of international criminal law. It has been known in domestic law since

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<sup>84</sup> These options are briefly discussed in Appendix II of the *Working Group Report*, *supra* note 2. The report does not recommend any one option, although the first alternative of principal organ by amendment appears to be the least favored.

<sup>85</sup> See Julian J.E. Schutte, *Legal and Practical Implications, from the Perspective of the Host Country, Relating to the Establishment of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L. FORUM 423, 425-26 (1994).

<sup>86</sup> MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 359-74 (1969) [hereinafter FRIEDLAND, DOUBLE JEOPARDY]. The Canadian rule takes its name from *Kienapple v. R.*, 44 D.L.R.3d 351 (Can., 1974). In *Kienapple*, the defendant had been convicted of rape and unlawful sexual intercourse with a female under the age of 14, both stemming from the same incident. The Canadian Supreme Court held that the offenses "overlapped," and that "[t]here cannot be multiple convictions from the same delict . . ." *Id.* at 352.

<sup>87</sup> See Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591, 592 (1961).

the twelfth century and is now guaranteed in the domestic legal systems of almost every state.<sup>88</sup> The principal expression of *non bis in idem* in conventional international law is Article 14, para. 7 of the Civil and Political Rights Covenant:

No one shall be liable to be tried or punished for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.<sup>89</sup>

Article 42 of the 1994 I.L.C. Draft Statute provides for the guarantee of *non bis in idem*. This Article borrows heavily from the double jeopardy provisions in the statutes of the Yugoslav and Rwandan tribunals.<sup>90</sup> Articles 48 to 50, which provide for appeal and review, also have significant double jeopardy implications; appeal and review will be discussed after the section on double jeopardy issues between different proceedings.

### 1. Double Jeopardy Between Different Proceedings

The effect of the double jeopardy guarantee between different proceedings in Article 42 can be summarized in the following manner:

SITUATION 1: Where a prosecution before another court *follows* a final order of the I.L.C. Court, the order of the I.L.C. Court would operate as a complete bar to the second trial. While the article itself speaks in terms of first and subsequent "trials," the commentary indicates that the article's intended concern is more precisely final orders or determinations on the merits of a case. For example, a first trial that was held but terminated before a final order was issued would not operate to bar a second proceeding.<sup>91</sup> "Another court" refers to any court other than

<sup>88</sup> See FRIEDLAND, DOUBLE JEOPARDY, *supra* note 86, at 3, 6, 358; JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 120-54 (1969); Res. in Int'l L., Harv. L. Sch., *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. (Supp.) 437, at 602-12 (1935) (setting forth art. 13, *non bis in idem*, with commentary) [hereinafter Harvard Research]. For the Canadian perspective, see Canadian Charter, *supra* note 60, § 11(h); and Criminal Code, R.S.C., ch. C-46, §§ 7(6), 12, 607(6) (1993) (Can.). The U.S. Constitution states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST., amend. V.

<sup>89</sup> I.C.C.P.R., *supra* note 61, at art. 14, ¶7, 999 U.N.T.S. at 177. See also Convention Between Member States of the European Communities on Double Jeopardy, May 25, 1987, art. 1, 20 E.C. BULL. No. 5, at 114 (1988) [hereinafter E.C. Double Jeopardy Convention] (articulating the same principle).

<sup>90</sup> See Yugoslav Statute, *supra* note 11, at art. 10, 32 I.L.M. at 1177; Rwandan Statute, *supra* note 12, at art. 9, 33 I.L.M. at 1605.

<sup>91</sup> Working Group Report, *supra* note 2, Commentary, Addendum 2, at 21.



the I.L.C. Court; therefore, subsequent proceedings before domestic courts or other international tribunals would be barred by a final order previously issued by the I.L.C. Court.

SITUATION 2: Where a final order before another court *precedes* prosecution before the I.L.C. Court, the Draft Statute mirrors the Yugoslav and Rwandan provisions. The second trial (that is, the I.L.C. Court trial) would be permissible, but only in two occasions: first, if the act(s) in question had been characterized at the first trial as "an ordinary crime" and not a crime within the jurisdiction of the I.L.C. Court; or second, if the first trial had not been impartial or independent, or had been designed to shield the accused from international criminal responsibility, or had not been diligently prosecuted — that is, if the first trial had been "a sham." In the event that the second trial were to proceed to conviction and sentencing, the I.L.C. Court would have to take into account the penalty already served by the convicted person in respect of the first trial.

SITUATION 3: In the case of multiple proceedings *before the I.L.C. Court itself*, the Draft Statute is curiously silent. There is no provision prohibiting the Court itself from trying a person more than once in respect of the same act or acts.

The foregoing double jeopardy guarantee improves upon the protection in past proposals in a number of ways. Unlike the U.N. Draft Statute (1953) and the I.L.A. Proposal (1982), the 1994 I.L.C. Draft Statute contemplates proceedings in non-contracting states in structuring the guarantee. For example, even if the first trial had occurred in a state that was not a state party to the Statute, the I.L.C. Court would still be bound to exercise the restraint set out in situation 2 above. The Statute also surpasses the Yugoslav and Rwandan tribunal statutes in that they contemplated only domestic courts in their guarantees. In contrast, Article 42 encompasses "any other court" in its attempts to avoid double jeopardy situations. For example, in situation 1 above, a final order of the I.L.C. Court would bar subsequent proceedings in any other judicial forum, domestic or international.

While the absolute bar on subsequent proceedings in situation 1 is commendable, the incomplete protection afforded in situations 2 and 3 raises important questions about the proper scope of *non bis in idem* in international law. Of the two situations, number 3 is the most easily addressed. The lack of a prohibition against multiple trials before the I.L.C. Court in respect of the same act or acts is a direct challenge to *non bis in idem*. The danger of an accused person being put in jeopardy more than once for the same act is exacerbated by the considerable overlap between the different offenses that form the subject matter

jurisdiction of the Court.<sup>92</sup> For example, the act of torture against civilians during armed conflict constitutes an offense under several heads of jurisdiction enumerated in the Draft Statute, including crimes against humanity,<sup>93</sup> the "grave breaches" sections of the Geneva Conventions,<sup>94</sup> and the Torture Convention itself.<sup>95</sup> Conceivably, the same person could be charged and prosecuted before the I.L.C. Court several different times for different offenses, all arising out of the same act of torture. The statutes of the two existing international criminal tribunals are similarly deficient, and the Yugoslav Statute has been criticized by the American Bar Association for this reason.<sup>96</sup> Therefore, the I.L.C. is strongly urged to revise Article 42 of the Draft Statute to explicitly bar multiple proceedings before the I.L.C. Court in respect of the same act or acts.

The situation presented in situation number 2, that of proceedings in the I.L.C. Court following the final order of another court, is considerably more difficult. Recall that the motivating principle underlying *non bis in idem* is the belief that no one should be twice harassed for one and the same cause. An accused person has the right to expect finality to judicial proceedings once all avenues of appeal have been exhausted. The question is whether, properly interpreted, *non bis in idem* should permit a second trial and, if so, on what grounds.

A brief consideration of the law pertaining to multiple criminal proceedings between domestic courts may assist our analysis of this question. Not surprisingly, the academic literature and case law on interjurisdictional double jeopardy issues is restricted to relations between states, and does not contemplate international tribunals that, to date, have not existed on any sustained basis. While a state is not bound, in the absence of treaty, to recognize the penal claim of another state for the

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<sup>92</sup> See *Working Group Report*, *supra* note 2, Commentary, Addendum 1, at 20.

<sup>93</sup> See *Working Group Report*, *supra* note 2, 1994 Draft Statute, at art. 20(d).

<sup>94</sup> The Geneva Conventions of 1949 are included in the list of treaties in the Annex and enter the jurisdiction of the Court through Article 20(e). *Id.* at art 20(e). Specifically, the torture of civilians is an offense pursuant to Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 6 U.S.T. 3516, 3618, 75 U.N.T.S. 287, 388.

<sup>95</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. TREATY DOC. NO. 20, 100th Cong., 2nd Sess. (1994); 23 I.L.M. 1027 (1984), *modified by* 24 I.L.M. 535 (1985). The Convention enters the Court's jurisdiction through Article 20(e) of the 1994 Draft Statute, *Working Group Report*, *supra* note 2.

<sup>96</sup> SPECIAL TASK FORCE OF THE A.B.A. SECTION OF INT'L L. & PRACTICE, A. B. A. REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 44 (1993) [hereinafter A.B.A., YUGOSLAV TRIBUNAL REPORT].

purposes of enforcement, the question of recognition for the purposes of preventing double jeopardy is far different.<sup>97</sup> The case of enforcement between states entails one state's imposition on the sovereignty of another, with the enforcing state doing the bidding of its adjudicating neighbour. In contrast, the case of recognition between states for double jeopardy purposes is concerned more with upholding the rights of the individual than with relations between sovereign entities.<sup>98</sup>

English law enforces a strong double jeopardy guarantee between foreign domestic jurisdictions. Proof of a conviction or acquittal in a foreign state will sustain a plea of *autrefois convict* or *acquit* in respect of an English prosecution for the same act or acts, providing that the foreign court was a court of competent jurisdiction and the person truly was in jeopardy in the foreign proceeding.<sup>99</sup> This rule has long-standing support among criminal law scholars.<sup>100</sup> In Canada, the law is generally the same, although the Supreme Court of Canada has unfortunately departed from such a strong interpretation of double jeopardy protection in extradition cases.<sup>101</sup> The Law Reform Commission of Canada has endorsed the English position, namely, that double jeopardy protection should be enforced between foreign jurisdictions.<sup>102</sup> The European Convention on Double Jeopardy and the Harvard Draft Convention on Jurisdiction adopt similar approaches.<sup>103</sup>

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<sup>97</sup> FRIEDLAND, DOUBLE JEOPARDY, *supra* note 86, at 357.

<sup>98</sup> To the extent that double jeopardy matters do implicate international relations, they speak in favor of recognition between states for the purposes of double jeopardy. *See infra* note 104.

<sup>99</sup> The second proviso has been interpreted to deny double jeopardy protection to a person who had been convicted in absentia abroad and had no intention of ever returning to that jurisdiction. *See, e.g., R. v. Thomas*, [1984] 3 All E.R. 34 (Eng. C.A.).

<sup>100</sup> *See* FRIEDLAND, DOUBLE JEOPARDY, *supra* note 86, at 360-68.

<sup>101</sup> For a discussion of the general rule in Canada, see DOUBLE JEOPARDY, PLEAS AND VERDICTS 15-17 (L. Reform Comm'n of Canada Working Paper No. 63, 1991). For the Canadian Supreme Court's most egregious rejection of double jeopardy principles, see *R. v. Van Rassel*, [1990] 1 S.C.R. 225, 225-27 (Can.), wherein the Court upheld the conviction of a person who, prior to extradition to Canada, had already been tried and acquitted in the United States for the same act.

<sup>102</sup> DOUBLE JEOPARDY, PLEAS AND VERDICTS, *supra* note 101, at 61.

<sup>103</sup> E.C. Double Jeopardy Convention, *supra* note 89, at art. 1, 20 E.C. BULL. NO. 5 at 114; Harvard Research, *supra* note 88, at 602-16. Like Canada, however, the domestic American practice is not universally in favor of strong double jeopardy protection between jurisdictions. *See, e.g., Bartkus v. Illinois*, 359 U.S. 121 (1959) (upholding the state court conviction of a person already convicted of the same offense by a federal court).

We return to the question of *non bis in idem* between domestic and international jurisdictions. In situation 2 above, the I.L.C. Draft Statute would permit an international trial if the previous domestic trial either had been for "an ordinary crime" or had been "a sham." This Article will argue that, properly interpreted, the principle of *non bis in idem* permits the second exception, but not the first.

The "sham exception" is consistent with both the English position on interjurisdictional double jeopardy set out above, and the rationale underlying the double jeopardy guarantee itself. Under the sham exception, three types of first trials (yielding an acquittal) would permit a second prosecution: trials that were not impartial or independent; trials that were designed to shield the accused from international criminal responsibility; and trials that were not diligently prosecuted. Judicial impartiality or independence is analogous to the English requirement that the foreign court be a court of competent jurisdiction, in the sense that this criterion looks more to the judicial quality of the first tribunal than to the quality of the actual trial. Tribunals that are not impartial or independent could be construed as not being courts of competent jurisdiction. The second two trial types — "shielding" and "lack of diligence" — closely parallel the English requirement that the accused have truly been in jeopardy in the first proceeding in order to enforce double jeopardy protection. Both "shielding" and "lack of diligence" protect the accused person, either by design or effect, so as to remove any true sense of jeopardy from the first trial. In this sense, a sham proceeding may be treated as a nullity for double jeopardy purposes. Furthermore, the sham exception accords with the equitable doctrine of bad faith in common law legal systems. There is a palpable unfairness in permitting the accused to rely upon a sham initial proceeding in order to avoid a second prosecution. Therefore, largely by analogy to the domestic position in England, the sham exception is not inconsistent with the principle of *non bis in idem* in international law.

The "ordinary crime" exception is another matter. Unlike the sham exception, the ordinary crime exception does not question the integrity or validity of the first trial; yet, though valid, the final order issued at that first proceeding is ignored. This exception carries two costs. First and most importantly, the ordinary crime exception mocks the double jeopardy guarantee. The second cost can be raised more summarily: the subsequent prosecution of a matter that, following a valid and impartial first trial, has already been made the subject of a final order is in direct offense to international comity.<sup>104</sup> Fisher states that interjurisdictional recognition

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<sup>104</sup> The principle of comity, *comitas gentium*, includes neighborliness, goodwill, and mutual respect between sovereign states. IAN BROWNLIE, *PRINCIPLES OF PUBLIC*

for the purposes of double jeopardy is necessitated by the principle of comity.<sup>105</sup> Although he made this assertion in the context of recognition between states, his cogent reasoning is equally applicable to recognition between domestic and international jurisdictions. If the I.L.C. Court were to ignore the valid final order of a domestic court, whether on the back of the ordinary crime exception or otherwise, it would indicate a serious disregard for the sovereignty of the issuing state — and an affront to international comity.

Returning to *non bis in idem* directly, like all civil and political rights, the right to double jeopardy protection must be analyzed through the eyes of the accused. It exists for that person's protection and before that right is limited or restricted in any way, at the very least, legal reasoning must be informed by an appreciation of how the right is actually experienced by the accused person. There is no escaping the fact that the accused person is doubly harassed under the ordinary crime exception: he or she must answer two separate cases on two separate occasions before two different tribunals, all for the same act. That person does not distinguish factually between the successive prosecutions, even if he or she can appreciate the finer legal distinctions between trials for ordinary crimes and trials for international crimes. Murder is murder, for example, whether it is stigmatized through the Criminal Code of Canada or the Geneva Conventions:

It is all the same to the accused. From his standpoint the situation is the same whether the successive prosecutions are by the same or different sovereignties; one is as bad as the other.<sup>106</sup>

Almost certainly, the ordinary crime exception will be defended on the basis that it permits the prosecution of different *legal acts*, albeit arising from the same *factual act*: the first trial was for a domestic or "ordinary" crime, and the second was for an international crime — two wholly different offenses. Analogies may even be made to the familiar domestic situation of a person being tried and convicted of aggravated assault, and then tried and convicted of murder when the victim dies, all to say that *non bis in idem* permits multiple prosecutions in respect of the

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INTERNATIONAL LAW 29-30 (4th ed. 1990); J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 19-20 (9th ed. 1984).

<sup>105</sup> See Fisher, *supra* note 87, at 603.

<sup>106</sup> *Id.* at 598. Interestingly, the severity of the domestic sentence may far exceed the penalty imposed by the international court. Unlike the courts of many states, the I.L.C. Court is restricted to a combination of imprisonment and fines, and is not authorized to impose capital punishment. *Working Group Report, supra* note 2, 1994 Draft Statute, at art. 47, and Commentary, Addendum 2, at 26.

same act. Any attempt to defend the ordinary crime exception on these grounds must fail, for two reasons.

First, *non bis in idem* is broader than simply a prohibition against being prosecuted twice for the same *offense*: it is a prohibition against being prosecuted twice for the same *cause*.<sup>107</sup> In the assault/murder example, a second prosecution was permissible because the death of the victim had given rise to a fresh cause. In contrast, there is no fresh cause in the case of a person being tried and convicted once for multiple counts of murder, and then tried and convicted again for genocide. The cause remained the same, certainly as viewed through the eyes of the accused, and the final order arising from the first trial should bar a second prosecution. "Cause" must not be equated with "offense." If the double jeopardy guarantee were limited to preventing multiple prosecutions for exactly the same offense, it would never apply in interjurisdictional cases. Using reasoning that is equally applicable to domestic-international recognition, Friedland argues in favor of England's complete recognition of the final orders of other states for double jeopardy purposes:

It would, of course, be impossible to find that the foreign offence was exactly the same as the English offence. At the least, the foreign offence would be against a different penal provision; and the elements involved in the offence, the defences open to the accused, the burden of proof, and the criminal process may all differ from the criminal law and procedure in England. However, to require that the offence be exactly the same would effectively eliminate the defence of double jeopardy in these cases.<sup>103</sup>

Second, there is a tremendous practical difficulty in determining whether the first (domestic) trial was in respect of an "ordinary" crime or whether it was sufficiently "international" to warrant the respect of the

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<sup>107</sup> Recall that the double jeopardy guarantee originates in the principle *nemo debet bis vexari pro una et eadem causa*, or, *no one should be twice harassed for one and the same cause*.

<sup>103</sup> FRIEDLAND, DOUBLE JEOPARDY, *supra* note 86, at 383. This view was endorsed by the Canadian Law Reform Commission in its 1991 recommendations. *See* DOUBLE JEOPARDY, PLEAS AND VERDICTS, *supra* note 101, at 61 ("Where a person is charged in Canada with the same or a *substantially similar* crime for which the person was acquitted or convicted by a court . . . in a foreign state, the foreign acquittal or conviction should have the same effect as a judgment in Canada . . .") (emphasis added). Similarly, for the purposes of double criminality in extradition cases, it is acknowledged that offenses in different jurisdictions can never be exactly the same. *See* ANNE W. LA FOREST, LA FOREST'S EXTRADITION TO AND FROM CANADA 70-71 (3d ed. 1991).

I.L.C. Court. The criminal laws of many countries do not make such ordinary international divisions: for example, although Canada has incorporated numerous international crimes into its domestic laws, categorization into "ordinary" and "international" would be difficult and some offenses, such as murder, presumably straddle both categories.<sup>109</sup> This second weakness in the ordinary crime exception has been acknowledged within the I.L.C. itself. James Crawford, Chair of the 1994 Working Group on the Draft Statute and Chair of the 1993 Sub-Group on Jurisdiction and Applicable Law, has publicly mused that the ordinary crime exception may be in breach of Article 14(7) of the Civil and Political Rights Covenant, which incorporates the principle of *non bis in idem*:

But there is a serious question whether the availability of a second trial in respect of a case involving "an ordinary crime" is really consistent with the guarantee in Article 14(7) of the International Covenant on Civil and Political Rights. The classification of an offence as an "ordinary crime" is independent of the facts of the given case . . . . In some legal systems there is no distinction between crimes which are "ordinary" and those which are not. And in any event ordinary crimes (e.g., murder) can be just as serious, and can cover the same ground, as crime within the jurisdiction of the court. On this view, it is not sufficient to ensure compliance with Article 14(7) merely to provide that a sentence already served for the corresponding ordinary crime will be taken into account.<sup>110</sup>

Like so many contributions to the international criminal court debate, the ordinary crime exception does not withstand principled critical analysis. However laudable and important it is to construct an effective mechanism for international criminal prosecution, the principle of *non bis in idem* must not be circumvented in the process:

While there certainly is a legitimate and strong interest in seeing those who have committed crimes against humanity [for example] . . . brought to justice, there appears to be no reason to suppose that this interest is so compelling that it ought to override the considerations that underpin the widespread prohibition against double jeopardy. No civilized legal

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<sup>109</sup> The Canadian Criminal Code includes the offenses of war crimes and crimes against humanity, Criminal Code, R.S.C., ch. C-46, § 7 (1993) (Can.); piracy, *id.* § 74; torture, *id.* §§ 7, 269.1; and crimes against internationally protected persons, *id.* § 431. All of these have obvious counterparts in international criminal law.

<sup>110</sup> Crawford, *Draft Statute*, *supra* note 16, at 144. This criticism of the ordinary crime exception has obvious implications for the legality of the statutes for the Yugoslav and Rwandan tribunals, which contain very similar provisions.

system places ascertainment of guilt and conviction above all other considerations.<sup>111</sup>

Therefore, the I.L.C. is strongly urged to abandon the ordinary crime exception to the double jeopardy guarantee in Article 42 of the Draft Statute. The sham exception to the guarantee is not inconsistent with *non bis in idem*, and is broad enough to address the fear that fabricated domestic trials will shield criminals from international prosecution.

## 2. Double Jeopardy in Appeal and Review

Part 6 of the Draft Statute provides for appeal and review.<sup>112</sup> Pursuant to Article 14, paragraph 5 of the Civil and Political Rights Covenant, every person convicted of a crime has the right to an appeal of sentence and conviction.<sup>113</sup> Because appeal and review threaten the finality of the order made at trial, Part 6 has significant implications for the right to double jeopardy protection. The question at hand is whether the I.L.C. has struck the proper balance between finality and appeal/review in the Draft Statute.

The Statute grants equal rights of appeal to the prosecutor and convicted person, on the following grounds: procedural unfairness, error of fact or law, or disproportion between crime and sentence.<sup>114</sup> These rights extend to orders of conviction, acquittal, and sentence. The sole

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<sup>111</sup> A.B.A., YUGOSLAV TRIBUNAL REPORT, *supra* note 96, at 43. Note, however, that the A.B.A.'s complete position on double jeopardy before international tribunals is somewhat anomalous. In respect of the Yugoslav Statute, which contains a similar ordinary crime exception, the A.B.A. recommended that "ordinary crime" be clarified, but not abandoned as a violation of principle. *Id.* at 45-46. In respect of the I.L.C. Draft Statute, the A.B.A. approved of the ordinary crime exception without clarification, but curiously recommended that the general double jeopardy guarantee be substantially weakened to apply only to states parties that had accepted the I.L.C. Court's jurisdiction in that particular case. American Bar Association, *Task Force Report on an International Criminal Court*, 28 INT'L LAWYER 475, 499-500 [hereinafter *Task Force Report on an International Criminal Court*]. Finally, in the A.B.A.'s own 1991 proposal for an international criminal court, double jeopardy concerns were not addressed. *Id.*

<sup>112</sup> Note that Article 9 provides for the establishment of a separate appellate chamber which would consist of the President of the Court and six other judges, at least three of whom must be recognized experts in international law. *Working Group Report, supra* note 2, 1994 Draft Statute, at art. 9.

<sup>113</sup> I.C.C.P.R., *supra* note 61, at art. 14, ¶5, 999 U.N.T.S. at 177.

<sup>114</sup> *Working Group Report, supra* note 2, 1994 Draft Statute, at art. 48. The grant of equal rights of appeal mirrors the approach taken in Article 25 of the Yugoslav Statute, *supra* note 11, 32 I.L.M. at 1186, and Article 24 of the Rwandan Statute, *supra* note 12, 33 I.L.M. at 1611.



difference in prosecutorial and convicted person appeals lies in the powers of the Appeals Chamber. Following a successful appeal from acquittal by the prosecutor, the chamber would be restricted to ordering a new trial; in contrast, following a successful convicted person appeal, the chamber could reverse or amend the trial decision or, if necessary, order a new trial.<sup>115</sup> Revision would also be equally available to the prosecutor and convicted person on the grounds that new evidence had been discovered which had not been available at the time of the conviction and which could have been a decisive factor in the conviction.<sup>116</sup> The Statute does not allow for the review of an acquittal, a decision that the Working Group believed was compelled by the principle of *non bis in idem*.<sup>117</sup>

In spite of its sound approach to revision, the I.L.C. has designed an appeal structure that has a great potential to subvert the double jeopardy guarantee. Specifically, the expansive right of prosecutorial appeal in the Statute directly threatens the accused person's expectation of finality after trial. The remedy restriction imposed on the Appeals Chamber when allowing an appeal from acquittal does not address the fundamental problem that the accused would still be placed in jeopardy twice for the same offense. This is not to say that the concept of a prosecutorial right of appeal *per se* is inconsistent with *non bis in idem*. Article 14(7) of the Civil and Political Rights Covenant recognizes that double jeopardy protection is a right held by any person *finally* convicted or acquitted of a criminal offense; "finally" must be taken to contemplate lawful avenues of appeal, whether initiated by the prosecutor or convicted person, a view that has been adopted in the domestic context by the Supreme Court of Canada.<sup>118</sup> Nevertheless, the greater the ability of a prosecutor to disturb the verdict rendered at trial, more precisely an order of acquittal, the weaker the acquitted person's right to double jeopardy protection. In its most extreme form, the prosecutorial right of appeal would allow an accused person to be tried again and again, being made to face increasingly strong cases by the prosecution, until finally the probability of conviction approached a certainty.

In domestic Canadian law, this evil is prevented by limiting the

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<sup>115</sup> *Working Group Report*, *supra* note 2, 1994 Draft Statute, at art. 49.

<sup>116</sup> *Id.* at art. 50. This review provision is substantially the same as Article 26 of the Yugoslav Statute, *supra* note 12, 32 I.L.M. at 1187, and Article 25 of the Rwandan Statute, *supra* note 13, 33 I.L.M. at 1611.

<sup>117</sup> See *Working Group Report*, *supra* note 2, Commentary, Addendum 3, at 3-4.

<sup>118</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30, *aff'g on this point* 52 O.R.2d 353 (C.A. 1986). This decision was based in part on section 11(h) of the Canadian Charter of Rights and Freedoms, *supra* note 61, which also ascribes the double jeopardy right to persons "finally" acquitted or convicted of an offense.

Crown's right to appeal from an acquittal to questions of law alone.<sup>119</sup> Yet, even this position has been criticized as being inconsistent with *non bis in idem*, particularly in light of the indeterminacy of the distinction between questions of fact and law.<sup>120</sup>

In England and the majority of the other Commonwealth countries, the Crown is not able to appeal from an acquittal on any ground.<sup>121</sup> Similarly, the American domestic position eliminates prosecutorial appeals from acquittal altogether:

A State may not put a defendant in jeopardy twice for the same offence. *Benton v. Maryland*, 395 U.S. 784. The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation." See *Fong Foo v. United States*, 369 U.S. 141, 143. If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.<sup>122</sup>

Reliance on the precedent set in the former Yugoslavia and Rwanda should not assist the I.L.C. The fact that the Yugoslav and Rwandan tribunal statutes permit prosecutorial appeals from an acquittal has itself been criticized as undermining the double jeopardy guarantee. The American Bar Association has recommended that prosecutorial appeals be restricted to *interlocutory* questions of law only, with only the accused being able to appeal any final order made at trial.<sup>123</sup>

The foregoing criticisms of a liberal prosecutorial right of appeal make eminent sense. While avenues of appeal are contemplated by the double jeopardy guarantee in Article 14(7), the guarantee would be effectively gutted if the prosecution were unrestricted in its ability to mount successive attempts at winning a conviction. Therefore, the ability of a prosecutor to appeal from an acquittal on grounds *other* than ques-

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<sup>119</sup> Criminal Code, R.S.C., ch. C-46, § 676(1)(a) (1993) (Can.).

<sup>120</sup> See C. David Freeman, *Double Jeopardy Protection in Canada: A Consideration of Development, Doctrine and a Current Controversy*, 12 CRIM. L.J. 3, 19-22, 26-27 (1988) (proposing that prosecutorial appeals be limited to questions of law that arise prior to the entry of a plea by the accused person).

<sup>121</sup> The Commonwealth positions are briefly surveyed by the Ontario Court of Appeal in *R. v. Morgentaler*, 52 O.R.2d at 403-04.

<sup>122</sup> *Arizona v. Washington*, 434 U.S. 497, 503 (1978).

<sup>123</sup> See A.B.A., YUGOSLAV TRIBUNAL REPORT, *supra* note 96, at 41-43; *Task Force Report on an International Criminal Court*, *supra* note 111, at 505-06 (regarding the I.L.C. Draft Statute).

tions of law alone is not practically consistent with *non bis in idem*, and the I.L.C. is urged to amend the Draft Statute in this respect.

The prosecutor's ability to appeal from an acquittal on questions of law alone is more difficult to resolve, especially in light of the domestic prohibition on such appeals that exists in several states. There is an obvious interest in ensuring that the final judgments of the I.L.C. Court are correct in law, an objective which is not diminished by the fact that a legal error at trial may have yielded an acquittal. The dichotomy between questions of fact and law is perpetuated by the personnel structure that is envisioned for the Court: the judges of the Trial Chamber are expected to be criminal trial experts, while the Appeals Chamber will have a greater proportion of judges with only international law expertise, but not necessarily criminal trial expertise.<sup>124</sup> Consequently, while findings of fact made at trial may be highly reliable and worthy of preservation, it may be desirable for the Appeals Chamber to be able to scrutinize the trial judge's decisions of law — even if those decisions had produced an acquittal. Therefore, relying considerably on the Canadian domestic approach, this author is not prepared to recommend the elimination of the prosecutorial right of appeal from acquittal on questions of law alone. However, this should be the sole avenue for prosecutorial appeals from acquittals rendered at trial.

#### *E. Deterrence*

The preceding discussion concludes this Article's assessment of the 1994 I.L.C. Draft Statute in respect of four principles of international criminal law that have strong ties to jurisdictional structure. The Article moves now to a consideration of how well the Draft Statute is capable of fulfilling the two most important *objectives* of international criminal law that relate to jurisdiction: deterrence and legitimacy. Unlike principles, objectives demand no proof of their status in international law. Instead, they represent the goals of the international court project, or more precisely for the purposes of this Article, those goals of the project that determine what form the court's jurisdictional structure should take.

The objective of deterrence is critical. It is the world community's desire to avert future criminal acts, particularly acts of the horrifying scale and gravity seen on numerous occasions this century, that provides the greatest impetus for the establishment of a permanent international criminal court. More broadly, deterrence could be seen as a necessary objective of any criminal justice system:

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<sup>124</sup> See *Working Group Report*, *supra* note 2, 1994 Draft Statute, at arts. 6, 9.

Without a reasonable prospect of thereby reducing the incidence of harm, it would be difficult to defend a system of penal sanctions.<sup>125</sup>

General deterrence is most effective when the moral stigma of criminalization is combined with the concomitant expectation of eventual prosecution and punishment.<sup>126</sup> Certainty and predictability play large roles in deterrence: the ability of a law or penal institution to deter hinges directly on the degree to which would-be offenders can predict the consequences of committing crimes, especially the fact that they will definitely be prosecuted.<sup>127</sup> Another inadequacy of *ad hoc*ery is exposed: in light of the rarity with which *ad hoc* tribunals have been convened, as well as the variability of their jurisdictional structures, there is no predictability in the Yugoslav/Rwandan approach, and thus, no deterrence. Once again, the I.L.C.'s choice of a permanently constituted court is commendable. Furthermore, by eliminating the "barrier" of state consent for genocide matters, the grant of inherent jurisdiction to the Court for this offense is laudable from the perspective of deterrence. Providing that the court receives a complaint of genocide from a state that is party to both the Draft Statute and the Genocide Convention, there would be no legal barriers to prosecution.<sup>128</sup>

One important barrier to prosecution remains in the proposed system, however. In failing to eliminate the political offense exception to extradition, the Draft Statute is seriously deficient. The Draft Statute provides for the transfer of persons to the I.L.C. Court in a manner similar to extradition, with state obligations to cooperate varying in relation to the type of offense and the position of the requested state under the Statute.<sup>129</sup> Unless a higher obligation is specified, a state party faced with a transfer request would merely be obliged to follow its own legal procedures, which in many states include recognition of the political offense exception.<sup>130</sup> The product of eighteenth and nineteenth-century liberalism

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<sup>125</sup> COLVIN, *supra* note 67, at 28. Deterrence will be used here in its "general" sense; specific deterrence in the form of the incarceration of the convicted criminal, while an obvious objective of international prosecution, speaks more to questions of enforcement than the jurisdictional structure of an international court.

<sup>126</sup> BASSIÖUNI, DRAFT CODE AND STATUTE, *supra* note 6, at 54.

<sup>127</sup> COLVIN, *supra* note 67, at 25-37.

<sup>128</sup> Naturally, other extra-judicial factors may prevent prosecution and enforcement. The degree to which states fulfill their duty to cooperate with the I.L.C. Court under Part 7 of the Draft Statute will also determine the effectiveness of the model and, consequently, its deterrent effect.

<sup>129</sup> *Working Group Report*, *supra* note 2, 1994 Draft Statute, at art. 53.

<sup>130</sup> Significantly, through the Draft Statute's incorporation of the Genocide Convention, the political offense exception would not apply to a transfer request for a person

and the promotion of free political expression, the political offense exception is used by a state to refuse the extradition of a person suspected or convicted of a political offense. It has been the basis of extradition refusals between even otherwise friendly states such as the United Kingdom and the United States.<sup>131</sup>

The political offense exception has been strongly criticized as outdated in our age of modern terrorism where the line between political and criminal acts is not always easily drawn.<sup>132</sup> The most serious international crimes frequently have a high political content. It is almost inconceivable how, for example, genocide could be perpetrated without the active participation or, at the very least, complicity of government officials.<sup>133</sup> By precluding justiciability for terrorist-related offenses, for example, the political offense exception invites the exclusion of cases pertaining to apartheid, torture, and other offenses that are envisioned to be the core of the I.L.C. Court's work. Randall argues that the political offense exception eviscerates any meaningful role for judicial settlement in human rights and terrorist cases. Moreover, the judiciary is better suited to the adjudication of "political" offenses than the political organs of government due to its relative impartiality and, not surprisingly, its proficiency in the very business of adjudication.<sup>134</sup> The failure of the Yugoslav Statute to eliminate the political offense exception has been attacked.<sup>135</sup> Whatever merits the political offense exception may still hold in inter-state extradition matters, it should not exist as an option for transfers to an independent international criminal court.<sup>136</sup> Therefore, the I.L.C. is urged to expressly preclude the political offense exception in the Draft Statute.

#### F. Legitimacy

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suspected of genocide. The Genocide Convention explicitly prohibits use of the political offense exception. Genocide Convention, *supra* note 14, at art. VII, S. REP. NO. 2, at 10; 78 U.N.T.S. at 282.

<sup>131</sup> The United States has denied at least four British requests in recent years for the extradition of persons suspected of offenses related to the Irish Republican Army. Scharf, *supra* note 15, at 155, n.126. See also LA FOREST, *supra* note 108, at 81-83.

<sup>132</sup> Burgos, *supra* note 56, at 3-4.

<sup>133</sup> See generally RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 92-94 (1944).

<sup>134</sup> KENNETH C. RANDALL, *FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM* 108-11 (1990). See also *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (defending the legitimacy of the Court's adjudicative role even in cases with "significant political overtones").

<sup>135</sup> A.B.A., *YUGOSLAV TRIBUNAL REPORT*, *supra* note 96, at 52-54.

<sup>136</sup> Scharf, *supra* note 15, at 156.

Where there is no centralized enforcement of norms, as in international law, the voluntary compliance of parties is a key determinant of an institution's success. According to Franck, voluntary compliance is a product of the collection of perceived qualities that attach to any rule or institution, all of which is caught within the term "legitimacy."<sup>137</sup> He defines legitimacy as "a property of a rule or a rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule has come into being and operates in accordance with generally accepted principles of right process."<sup>138</sup> Thus, legitimacy determines the normative durability and stability of a rule or institution, and consequently, the degree to which parties will voluntarily follow it.

This is not to suggest that Franck's theory of legitimacy is necessarily unproblematic and internally consistent at all levels. It awkwardly combines descriptiveness and normativeness, occasionally in circular fashion. At times, it is descriptive (rule/institution *X* is legitimate because states feel bound to obey it), and at others, predictive (states will feel bound to obey rule/institution *X* because it is legitimate). In large measure, this difficulty is attributable to Franck's contextual approach. At the same time that he establishes a seemingly objective, analytical framework for empirically assessing the legitimacy of a rule or institution, he makes the theory reflective of how states actually react toward the rule or institution. Paradoxically, however, contextualization is the ultimate strength of the theory, and whatever limitations it may have in extended applications, Franck's approach to international compliance is the most sophisticated analysis available today.<sup>139</sup> This Article proposes that legitimacy should be regarded as an important objective of international law-making, and that Franck's conceptualization of legitimacy is a useful framework for assessing how well this objective is being or will be achieved.

Franck identifies four indicia of legitimacy: adherence, determinacy,

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<sup>137</sup> See generally THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) [hereinafter FRANCK, *THE POWER OF LEGITIMACY*]. Franck's general course in 1993 at the Hague Academy of International Law was a model of insight in the area of legitimacy and international institutions, and an excellent summary of his conceptualization of legitimacy can be found in the collected Academy lectures. See also FRANCK, *FAIRNESS IN THE INTERNATIONAL LEGAL AND INSTITUTIONAL SYSTEM*, *supra* note 52, at 41-62.

<sup>138</sup> FRANCK, *THE POWER OF LEGITIMACY*, *supra* note 137, at 24.

<sup>139</sup> For a brief but perceptive critique of Franck's theory of legitimacy, see Marti Koskeniemi, Book Review, 86 AM. J. INT'L L. 175 (1992) (reviewing THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS*).

symbolic validation, and coherence, all of which are discussed in more detail below. The objective of legitimacy is consistent with the contractarian view of community, and it is consistent with the traditional view of sovereign and equal states consensually contracting with each other to establish an international legal system.<sup>140</sup> It follows that legitimacy demands the free participation of states in the creation of international institutions.<sup>141</sup> The requirement of free state participation in the construction of an international criminal court has obvious implications for whether the I.L.C. was correct in proposing a court with concurrent original jurisdiction. Exclusive jurisdiction would have necessitated a mechanism for asserting jurisdiction that was at least partly compulsory in order to secure voluntary mechanisms for submitting a case to international prosecution. Furthermore, concurrent jurisdiction is the trend in the practice of international criminal law between states. Due to both the changing nature of international criminal activity and the pattern of state exercise of jurisdiction, states are becoming less willing to defer to other states and an increasing number of criminal cases are now subject to concurrent jurisdiction.<sup>142</sup> In its contemplation of an international criminal court, the Genocide Convention also envisages a court that may share its jurisdiction over genocide with the domestic courts of states.<sup>143</sup> International support is far greater for a concurrent criminal court than for a court with exclusive jurisdiction.<sup>144</sup> Aside from the Sottile Proposal (1951), which was silent on this point, and the Bassiouni Proposal (1987), which used "primacy" to effectively create an exclusive jurisdiction model, all previous proposals for a permanent international criminal court have advocated the concurrent approach.

The legitimacy of the concurrent approach is revealed by Franck's four-part analytical framework. *Adherence* is the vertical nexus between

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<sup>140</sup> See FRANCK, FAIRNESS IN THE INTERNATIONAL LEGAL AND INSTITUTIONAL SYSTEM, *supra* note 52, at 47. Accordingly, Franck states that the first necessary condition of legitimacy is state consent, and the second, *pacta sunt servanda*, or, *parties are bound to that to which they consent*. *Id.*

<sup>141</sup> Similarly, the degree of state participation and consent is an important factor in determining an international institution's political acceptability. The spectre of losing sovereignty involuntarily to an international court is a frequently cited concern of states. See M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 161 (1992).

<sup>142</sup> FRIEDLAND, DOUBLE JEOPARDY, *supra* note 86, at 357, 372-75.

<sup>143</sup> Genocide Convention, *supra* note 14, at art. VI, S. REP. NO. 2, at 9; 78 U.N.T.S. at 281-82.

<sup>144</sup> See, e.g., Task Force Report on an International Criminal Court, *supra* note 111, at 475.

a primary rule of obligation (or, writ large, an institution) and the pyramid of secondary process rules in the community. These process rules refer to the method by which the community makes, interprets, and applies the primary rule or institution. In respect of an international criminal court, the primary rule is the court itself. The secondary process rules are the ways in which states ordinarily create, participate in, and respond to international institutions. The above trend indicates that existing process rules favor international jurisdictional structures that are concurrent, not exclusive, which suggests that the I.L.C. Court should enjoy a high level of adherence among states.

Adherence will be further sustained by other characteristics of the Court. The I.L.C. has chosen an approach that is not only concurrent, but also almost entirely voluntary. Save its inherent jurisdiction over genocide and the possibility of Security Council action, the I.L.C. Court would assume jurisdiction in a given case only through state consent. Moreover, the I.L.C. Court would be able to defer to domestic proceedings in any given case, either upon application by a state or by the accused, or on its own motion.<sup>145</sup> While its implications for determinacy will be considered later, this high level of voluntariness accords with the usual establishment, interpretation, and application processes in international law. It also complements the existing system of inter-state extradition which, even when governed by an extradition treaty, retains a large amount of voluntary executive discretion.<sup>146</sup> The I.L.C.'s implementation method, voluntary accession to a multilateral treaty, is the normal method for establishing an international tribunal — a sharp contrast to the coercive imposition of the four international tribunals established to date. In his report on the creation of the Yugoslav Tribunal, Secretary-General Boutros Boutros-Ghali explained the usual implementation process and outlined some of the reasons why the multilateral treaty option is popular among states:

The approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty by which the States parties would establish a tribunal and approve its statute. This treaty would be drawn up and adopted by an appropriate international body (e.g., the General Assembly or a specially convened conference), following which it would be opened for signature and

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<sup>145</sup> *Working Group Report*, *supra* note 2, 1994 Draft Statute, at art. 35. This reflects the I.L.C.'s belief that some cases may not be appropriate for international adjudication, even if all formal requirements for the international court's jurisdiction have been met. See Crawford, *ILC Statute*, *supra* note 16, at 413-14.

<sup>146</sup> For a discussion of the benefits of complementing the existing system, see Scharf, *supra* note 15, at 160-61.



ratification. Such an approach would have the advantage of allowing for a detailed examination and elaboration of all the issues pertaining to the establishment of the international tribunal. It also would allow the States participating in the negotiation and conclusion of the treaty to exercise their sovereign will, in particular whether they wish to become parties to the treaty or not.<sup>147</sup>

In addition to gaining adherence through the normal establishment process, the I.L.C. Court would have adherence on the basis of the impartiality and competence of its judges. The international institution with the highest perceived legitimacy and fairness today is the International Court of Justice, and this status has been largely won by its institutional and adjudicative independence.<sup>148</sup> By attempting to build a new court that is consistent with this standard, the I.L.C. increases the adherence level of its Draft Statute. The importance of this element of adherence is evident when new proposals are compared with Nuremberg and Tokyo:

The post-World War II Nuremberg and Tokyo tribunals may well have made good law, but the prestige of the law thus made was not helped by the evident fact that these were victors' tribunals. A more evidently impartial tribunal composed of more manifestly independent and highly qualified international jurists would enhance the prestige and capacity of the law thus made to pull States and persons towards future compliance.<sup>149</sup>

The Draft Statute's sole departures from voluntariness and the normal method of establishment are its contemplation of Security Council action and its grant of inherent jurisdiction over genocide. The incorporation of Security Council measures taken under Chapter VII is more than merely a concession to that body's predominant position in international affairs. It is also an acknowledgment that, for all the attributes of a generally voluntary approach, some form of compulsory jurisdiction may be neces-

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<sup>147</sup> *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. SCOR, 48th Sess., ¶19, at 6-7, U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1163 (1993). Of course, in the particular case of the former Yugoslavia, the Secretary-General endorsed the idea of an *ad hoc* tribunal imposed by the Security Council, given the urgency of the situation and the time that would be required to establish a permanent tribunal. *Id.* ¶¶ 21-28, I.L.M. at 1168-69.

<sup>148</sup> FRANCK, FAIRNESS IN THE INTERNATIONAL LEGAL AND INSTITUTIONAL SYSTEM, *supra* note 52, at 302-03.

<sup>149</sup> *Id.* at 265. Although this passage was written in reference to the Yugoslav Tribunal, and not in the specific context of adherence, its reasoning applies equally to an appraisal of the I.L.C. Court.

sary in some situations.<sup>150</sup> In light of the Security Council's growing fondness for Chapter VII action, it is far better that any impositions of judicial settlement be made through a permanent institution than an *ad hoc* tribunal. As for the I.L.C. Court's inherent jurisdiction over genocide, there is a sufficiently high level of international approbation regarding this offense, including its undeniable status as *jus cogens* and the widespread ratification of the Genocide Convention, that it may be reasonable to isolate genocide as deserving such treatment. Certainly, among the members of the Working Group of the I.L.C., such special treatment of the offense of genocide was wholly uncontroversial.<sup>151</sup> The I.L.C. Court's inherent jurisdiction over genocide also highlights the tension between the different components of legitimacy. What legitimacy the Court may lose in adherence on the genocide question, it may gain in the second component of Franck's framework, determinacy. *Determinacy* is the textual ability of a rule (or an institution) to convey a clear message or meaning. Rules or institutions that say what they expect of their constituencies are more likely to influence behaviour. The more determinate or inelastic the standard, the more difficult it is to justify non-compliance. In respect of an international criminal court, determinacy requires that the court's role be readily apparent; that the scope of its jurisdiction be ascertained (or readily ascertainable); and that its applicability and relevance be generally obvious and easily understood. In setting out a clear list of its subject matter offenses, the Draft Statute is more determinate than, for example, the "menu" or "accordion" approach advocated in the A.B.A. Proposal (1991). However, this clarity is undermined by the complexity of the scheme by which the I.L.C. Court is able to assert jurisdiction in a given case. For the offense of genocide, however, notwithstanding potential adherence difficulties, the Draft Statute is highly determinate. Once a complaint of genocide is filed by a state that is party to both the Statute of the Court and the Genocide Convention, the I.L.C. Court would automatically acquire inherent jurisdiction. There is no requirement for state consent on a case-by-case basis and there is a high obligation on states to cooperate in genocide matters. Not only is such (relative) certainty the stuff of determinacy, it also furthers the objective of deterrence that was assessed in the preceding section.

Within the general concurrent jurisdiction structure, however, determinacy has an uphill struggle. Without the assistance of Bassiouni's "primacy" trump card, the I.L.C. Court would share jurisdiction in a given case with one or several states, always dependent upon their voluntary consent. There is no way of predicting the degree to which

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<sup>150</sup> Greenberg, *supra* note 1, at 138.

<sup>151</sup> See Working Group Report, *supra* note 2, Commentary, Addendum 1, at 21-22.

states would submit cases to the Court, and the certainty of international prosecution may not be much greater than it is today. At the same time, there are several reasons why states may voluntarily decide to transfer even difficult cases to the international court. For example, the state may wish to avoid the international embarrassment, potential conflict and retaliation that shielding an accused criminal invites.<sup>152</sup> The state may prefer independent international adjudication over domestic prosecution or extradition in an especially sensitive criminal matter.<sup>153</sup> Moreover, returning briefly to adherence, the very fact that the Court is voluntary and complements the existing international system may produce higher levels of state consent and submission, and greater certainty of international prosecution. Finally, the attributes of the concurrent approach must be measured against its principal alternative, compulsory exclusive jurisdiction. Most significantly, the apparent certainty of a compulsory approach may be no more than false determinacy in practice: even a court with exclusive and compulsory jurisdiction would still require state consent and cooperation in surrendering an accused person.<sup>154</sup>

The third indicator of legitimacy, *symbolic validation*, is a rule or institution's ability to communicate authority in a manner connected to the overall social and legal order. The principal factor under this head is the degree of permanency. Rules or institutions that are enduring or long-acknowledged, such as the international rules relating to diplomatic immunity, are better able to communicate authority than those of a temporary or variable nature. The importance of symbolic validation should not be underestimated. Franck suggests that high symbolic validation attracts greater obedience *voluntarily* than even massive force or other coercive measures.<sup>155</sup> By rejecting the *ad hoc* approach in favor of creating a permanent court, the I.L.C. proposes an institution with a high degree of symbolic validation.

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<sup>152</sup> Bassiouni & Blakesley, *supra* note 141, at 172-73.

<sup>153</sup> Following the Lockerbie aerial bombing incident, Libya refused the extradition requests of France, the United Kingdom, and the United States for the two persons suspected of the bombing, claiming that trials in those countries would not be independent or impartial. However, Libya stated that it would agree to transfer the accused persons to an international criminal tribunal for prosecution and trial. The stalemate continues. See Baez, *supra* note 7, at 313.

<sup>154</sup> See William N. Gianaris, *The New World Order and the Need for an International Criminal Court*, 16 FORDHAM INT'L L.J. 88, 116-17 (1992).

<sup>155</sup> See FRANCK, FAIRNESS IN THE INTERNATIONAL LEGAL AND INSTITUTIONAL SYSTEM, *supra* note 52, at 51-54. For example, with very few exceptions, the blue-helmeted peacekeeping missions of the U.N. have been successful in communicating authority and attracting compliance without the use of significant force. *Id.*

The final component of Franck's legitimacy has two aspects. *Coherence* is comprised of consistency (treating like cases the same), and the principled relationship of a rule or institution to other elements in the same system. Consistency is an important objective of any judicial institution, even tribunals such as the I.C.J. which are not technically bound by *stare decisis* nonetheless strive for consistency in their rulings.<sup>156</sup> Inconsistency in adjudication, that is, "checkerboarding,"<sup>157</sup> undermines the confidence of both states and the general public in the judicial process by suggesting that decisions bear no relation to the facts or law at hand. An *ad hoc* approach which convenes temporary courts for some crises and not others is the very essence of checkerboarding. It is utterly incapable of interpreting international conventions or defining international rights and duties in any consistent and enduring way. A permanent court would be more capable of developing a consistent body of international criminal law and, through its judicial record of decisions, it could potentially assume the quasi-supervisory leadership role that the I.C.J. now performs in public international law matters.

As for the second aspect of coherence, an institution's principled relationship to other elements in the legal system represents the community aspect of legitimacy. The greater the degree of connectedness, the more the institution is perceived to belong as a functioning component in the existing system. The I.L.C. Court's permanency mirrors the status of the predominant judicial institution in the world today, the I.C.J. As well, the Draft Statute's provision of a role for the Security Council establishes a coherent relationship with the world's predominant multilateral political institution. With the critical exception of some aspects of double jeopardy, the Draft Statute also successfully incorporates the primary principles of international criminal law, the most important of which (at least for the purposes of jurisdiction) have been the subject of this Article. Consequently, the I.L.C. has proposed an international criminal court that should bear a high degree of connectedness to the institutions and principles that animate the existing legal system. This combination of characteristics promises the birth of a relatively coherent tribunal and, all told, a relatively legitimate judicial institution.

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<sup>156</sup> BOWETT, *supra* note 80, at 274.

<sup>157</sup> Franck borrows this term from Ronald Dworkin. See FRANCK, FAIRNESS IN THE INTERNATIONAL LEGAL AND INSTITUTIONAL SYSTEM, *supra* note 52, at 55; RONALD DWORKIN, LAW'S EMPIRE 179 (1986).

#### IV. CONCLUSION

There is no question that the International Law Commission's 1994 Draft Statute for an International Criminal Court is a significant improvement on the models and proposals of the past. In particular, the Draft Statute should be celebrated as the promise of an end to the world community's current affair with *ad hoc* approaches to the establishment of international judicial bodies. At the same time, however, the jurisdictional structure of the Draft Statute fails to accord completely with fundamental principles and objectives of international criminal law. Therefore, the I.L.C. is strongly urged to take the following steps to amend the Draft Statute:

1. Amend Article 42 to expressly prohibit the trial of any person by the Court who has already been tried by the Court in respect of the same act or acts;
2. Remove Article 42(2)(a), thereby eliminating the "ordinary crime exception" to the guarantee of *non bis in idem*;
3. Amend Article 48(1) to restrict the right of the Prosecutor to appeal against a decision of acquittal to the ground of error of law alone; and
4. Amend Article 53 to expressly prohibit States parties from refusing a transfer request from the Registrar on the basis of the "political offense exception."